IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. [redacted]

78-377

GILBERT D. SCUDDER,

Appellant,

vs.

FLORIDA POWER CORPORATION, a Florida corporation, L. M. FOLSOM and PAULINE FOLSOM, his wife,

Appellees.

On Appeal From the District Court of Appeal of Florida, Second District

JURISDICTIONAL STATEMENT

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OPINION BELOW

The Opinion of the Supreme Court of Florida denying the Appellant's Petition for Writ of Certiorari is set forth in the Appendix at page A 1. The Opinion of the District Court of Appeal of Florida, Second District, is reported at 350 So. 2d 106 (Fla. 2d DCA 1977), and is set forth in the Appendix at page A 3.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1257(2), this being an appeal which draws into question the validity of Florida Statutes, Sections 704.01(2) and 704.04, on the ground that they are repugnant to the Constitution of the United States.

Appellant, Gilbert D. Scudder

(hereinafter "Scudder," "Plaintiff," or "Appellant,"), a resident of New York, filed an action against the Appellees, L. M. Folsom and Pauline Folsom (hereinafter "Folsom") and Florida Power Corporation (hereinafter "FPC") for trespass on the property appellant owned in Florida (A 17-45).

The Defendants Folsom, who owned land adjacent to the Plaintiff's property, had constructed a clay road across the Plaintiff's property and directed the Defendant FPC to install a distribution line following the aforesaid road to the Defendants' residence. As will be demonstrated later in this brief, the Defendants Folsom and FPC wilfully trespassed upon the Plaintiff's property, knowing they did not have the Plaintiff's consent or any legal right to conduct their aforesaid activities upon his property. In response to the Plaintiff's action and to purge themselves of their trespass,

the Defendants alleged by way of affirmative defense and counterclaim that a right of way over Plaintiff's property (1) was established by prescriptive easement, (2) constituted a common law way of necessity, or (3) was permissible as a statutory way of necessity under Florida Statutes, Section 704.01 (A 46-76).

On April 14, 1976, the Circuit Court of the Fifth Judicial Circuit, in and for Lake County, Florida, Judge Wallace E. Sturgis, Jr., presiding, awarded the Defendants Folsom a statutory way of necessity pursuant to Florida Statutes, Sections 704.01(2) and 704.04, for ingress and egress, electricity, and telephone servics, to the extent of 30 feet in width along the clay road built by the Folsoms across Plaintiff's property (A 77-104).

However, the court determined that the Defendant FPC trespassed upon the

Plaintiff's property because the said Defendant's use of the easement was not in an orderly and proper manner as required by Florida Statutes, Section 704.01(2) (A 93). In particular, the court found that the Defendant's utility poles were not within the 30foot easement granted by the court and were not even reasonably located in relation to the clay road and the aforesaid easement (A 92). Furthermore, the court determined that FPC followed a policy when installing the distribution lines which gave little or no consideration to the property rights of landowners, including the Plaintiff, such that the trespass was wilful, intentional, and with reckless indifference to the Plaintiff's property rights (A 94-97). The Plaintiff was awarded $7,400.00 in compensatory damages against the Defendants Folsom, $500.00 in compensatory damages against FPC for the taking of the

Plaintiff's property, and the sum of $25,000.00 punitive damages against FPC for its wilful trespass upon Plaintiff's property (A 100).

The trial court acknowledged that the statutes Defendant relied upon, Florida Statutes, Sections 704.01(2) and 704.04, appeared to violate the Plaintiff's constitutional rights as protected in the Constitution of the State of Florida and the United States Constitution. However, the court ruled that such a determination of constitutionality would have to be made by the appellate court (A 105-123).

On appeal, the District Court of Appeal of Florida, Second District, rejected the Plaintiff's constitutional challenge of Florida Statutes, Sections 704.01(2) and 704.04, vacated the awards of compensatory and punitive damages against FPC, shifted liability for the $500.00 compensatory damages against FPC

to the Folsoms, and affirmed the trial court's judgment in all other respects (A 3-16). Scudder's Petition for Rehearing was denied by the Second District on October 21, 1977 (A 124). On June 6, 1978, the Supreme Court of Florida denied Plaintiff's Petition for a Writ of Certiorari (A 1), which again attacked the constitutionality of the statutes in question. Notice of Appeal to this Court was timely filed on July 21, 1978 (A 126).

As the Supreme Court of Florida, Second District Court of Appeal, and the Circuit Court of the Fifth Judicial Circuit, in and for Lake County, Florida, have all rejected the Plaintiff's constitutional challenge to Florida Statutes, Sections 704.01(2) and 704.04, this matter is appropriately brought to this Court by appeal. In the event that this Court does not consider appeal the proper mode of review, Appellant requests

that the papers whereupon this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari pursuant to 28 U.S.C., Section 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Plaintiff/Appellant files this appeal as a resident of the State of New York who has been denied his constitutional rights as guaranteed by the First, Seventh, and Fourteenth Amendments to the Constitution of the United States and Article I, Declaration of Rights, Section 21, and Article X, Section 6(a) of the Constitution of the State of Florida, by the courts and legislature of the State of Florida. This case also involves Florida Statutes, Sections 704.01(2) and 704.04, which state:

> 704.01(2) Statutory way of necessity exclusive of common law right.-- Based on public policy, convenience and necessity, a statutory way of necessity exclusive of any common law right exists when any land or

> portion thereof outside any municipality which is being used or desired to be used as a dwelling or for agricultural or for timber raising or cutting or stockraising purposes shall be shut off or hemmed in by lands, fencing or other improvements of other persons so that no practicable route of egress or ingress shall be available therefrom to the nearest practicable public or private road. The owner or tenant thereof or anyone in their behalf lawfully may use and maintain an easement for persons, vehicles, stock and electricity and telephone service over and upon the lands which lie between the said shut-off or hemmed-in lands and such public or private road by means of the nearest practical route, considering the use to which said lands are being put; and the use thereof, as aforesaid, shall not constitute a trespass; nor shall the party thus using the same be liable in damages for the use thereof; provided, that such easement shall be used only in an orderly and proper manner.
>
> 704.04 Judical remedy and compensation to servient owner. When the owner or owners of such lands across which a statutory way of necessity under Section 704.01(2) is claimed, exclusive of the common law right, objects or refuses to permit the use of such way under the conditions set forth herein, or until he receives compensation therefor, then either party or the board of county commissioners, of such county may file suit in the circuit court of the county wherein the land is located in order to determine if the claim for said easement exists, and the amount of

compensation to which said party is entitled for use of such easement. Where said easement is awarded to the owner of the dominant tenement, it shall be temporary and exist so long as such easement is reasonably necessary for the purposes stated herein. The court, in its discretion, shall determine all questions including the type, extent and location of the amount of compensation, provided that if either of said parties so request in his original pleadings the amount of compensation may be determined by a jury trial. The easement shall date from the time the award is paid.

The provisions of the Constitution of the State of Florida involved in this case are as follows:

Declaration of Rights, Article I:

2. Basic rights
All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race or religion.

9. Due process
No person shall be deprived of life, liberty or property without due process of law, or be twice put in

jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

21. Access to courts
The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Article X:

6. Eminent domain
(a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.
(b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.

QUESTIONS PRESENTED

The questions presented by this appeal are the following:

1. Whether the taking of the Plaintiff's property pursuant to a statutory way of necessity, as provided in Florida Statutes, Section 704.01(2), upheld as constitutional by the Circuit Court of the Fifth Judicial Circuit, in and for Lake County, Florida, the Second District Court of Appeal, and the Florida Supreme Court, violates the Appellant's rights to due process of law as protected in the First and Fourteenth Amendments to the United States Constitution.

2. Whether Florida Statutes, Sections 704.01(2) and 704.04, upheld as constitutional by the Circuit Court of the Fifth Judicial Circuit, in and for Lake County, Florida, the Second District Court of Appeal, and the Florida Supreme Court, violate the Appellant's

rights to due process of law as protected in the Fourteenth Amendment to the United States Constitution by failing to award just compensation to the Appellant for the taking of his property pursuant to the aforesaid statutes.

3. Whether Florida Statutes, Sections 704.01(2) and 704.04, upheld as constitutional by the Circuit Court of the Fifth Judicial Circuit, in and for Lake County, Florida, the Second District Court of Appeal, and the Florida Supreme Court, violate the Appellant's rights to equal protection under the law as protected in the Fourteenth Amendment to the United States Constitution by the taking of the Appellant's property pursuant to the aforesaid statutes.

4. Whether Florida Statutes, Sections 704.01(2) and 704.04, upheld as constitutional by the Circuit Court of the Fifth Judicial Circuit, in and for Lake County, Florida, the Second Dist-

rict Court of Appeal, and the Florida Supreme Court, violate the Appellant's rights to redress of injury as protected in the First and Fourteenth Amendments to the United States Constitution by the taking of the Appellant's property pursuant to the aforesaid statutes.

5. Whether the taking of Appellant's property pursuant to Florida Statutes, Sections 704.01(2) and 704.04, upheld as constitutional by the Circuit Court of the Fifth Judicial Circuit, in and for Lake County, Florida, the Second District Court of Appeal, and the Florida Supreme Court, violate Appellant's right to trial by jury, as protected in the Seventh and Fourteenth Amendments to the United States Constitution.

STATEMENT

In April of 1973, Defendants Folsom began negotiations to purchase an 80-acre parcel of land in Lake County adjacent to real property owned by the Plaintiffs Scudder. Before closing the transaction and acquiring title to the said property the Folsoms promptly proceeded to construct a clay road upon the Plaintiffs' property from the east line of the property they were purchasing (a common boundary with the Plaintiffs' property) along the northern shore of Flat Lake to an existing clay road which ran approximately 2½ miles east to the nearest paved road to the east. During the time the road was being constructed the Folsoms applied to FPC for electric service to the property.

On or about October 12, 1973, the Plaintiff Gilbert D. Scudder was advised by a grove caretaker's telephone call of

the trespass upon his property and he caused his attorney to contact the Folsoms and advise them that the road was across his property without his consent or permission. Scudder caused fences to be built across the road and had "no trespassing" signs posted on both the east and west boundaries of his property at the point where the freshly built road entered his property. Within forty-eight hours the fence was found to be broken at the entry of said road to the Plaintiff's property. Thereafter, the Defendants Folsom directed FPC to construct the utility line across the Plaintiffs' property to their property without the Plaintiffs' permission. Three poles with lines traversing the shore line of Flat Lake were placed on the Plaintiffs' property on or about November 6, 1973. Plaintiffs thereafter brought suit against the Defendants Folsom and FPC for trespass and eject-

ment, seeking the removal of the road and the power lines and damages for trespass.

Plaintiffs, Gilbert D. Scudder and his wife, Irene, brought two separate actions. One action was in trespass against FPC for the wrongful placement of three wooden utility poles along the lakefront portion of Plaintiffs' 120-acre citrus grove in Lake County, Florida. The second action was brought by Plaintiffs against the Defendants Folsom, the landowners of an adjacent 80-acre parcel, adjoining Plaintiffs' property on the west. The action against the neighboring Folsoms was for the wrongful trespass and construction and use of a clay road across the lakefront portion of the Plaintiffs' land. The two actions were consolidated. Plaintiffs demanded judgment for ejectment of Defendants, damages for trespass, and in the alternative, damages for inverse condemnation

as a result of the construction of the clay road and power lines over their property.

By way of defense and counterclaim, Defendants FPC and Folsom alleged that the right of way over Plaintiffs' property (1) was established by prescription, (2) constituted a common law right of way of necessity, or (3) was permissible as a statutory way of necessity under Section 704.01(2), Florida Statutes. The Defendants' claims for an easement, including a statutory way of necessity, were raised for the first time in defense to the Plaintiffs' claim of trespass.

After consolidation, FPC filed a Crossclaim against Co-Defendants, Folsom, asserting that Folsoms were liable to FPC for all or a portion of Plaintiffs' claim against FPC and seeking indemnification for any damages for which FPC might ultimately be held liable to

Scudders.

At the time of trial, Plaintiff Irene J. Scudder was deceased, and the trial proceeded with Gilbert D. Scudder as sole Plaintiff. The order of trial was altered, over the objections of the Plaintiff that his constitutional right to trial by jury was being violated. The Court first received evidence as to the legal, nonjury issues raised by the Defendants on the issue of inverse condemnation. Only after these issues were decided did the Court consider the remaining issues of trespass, compensation and damages.

In its Final Judgment (A 88-90), the Court held that no prescriptive easement existed for the road and that the requirements for a common law right of way had not been established. The Court determined, however, that Defendants Folsom were entitled to a statutory way of necessity over Plaintiff's property

in accordance with Section 704.01(2), Florida Statutes, not to exceed 30 feet in width, traversing the shore of Flat Lake from Folsoms' east boundary across Plaintiff's property to an existing clay county road known as Phil Peters Road. This easement across the Plaintiff's property was created as a statutory way of necessity after the trespass had occurred and suit was pending, for the purpose of granting Folsom legal ingress and egress, electricity and telephone service over Scudder's property.

The Court in its Final Judgment also determined that FPC was guilty of trespass and liable to the Plaintiff for $500.00 compensatory damages and $25,000.00 punitive damages (A 100), on the basis of its finding that the location of its two wooden utility poles were not placed within the 30 foot wide easement as defined by the court, and the evidence established that the tres-

pass committed by FPC was the result of a company policy which constituted a wilful, intentional, and reckless indifference to the property rights of the Plaintiff (A 92). As just compensation for the use of the statutory way of necessity, the court further ruled that the Plaintiff should recover from the Defendants Folsom the sum of $7,400.00 damages for the value of the easement being taken (A 100). Finally, the court denied FPC's crossclaim against the Folsoms for indemnification (A 101).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The Plaintiff initiated this litigation by filing Complaints against the Defendants Folsom and FPC for damages for trespass and ejectment, and to enjoin the Defendants from continuing to trespass upon his property (A 17-45). A trial by jury was requested by the Plaintiff on these issues (A 17-30). Notwithstanding the Plaintiff's request for trial by jury on his action in trespass, the trial court entered an order that it would try all equitable issues without a jury (A 129). In effect, the order denied the Plaintiff his right to a jury trial on his trespass action against the Defendants. Also, by trying all equitable issues without a jury, the court altered the order of trial by initially taking testimony and evidence on the affirmative defenses raised by the Defendants,

including statutory way of necessity, such that the Plaintiff was required to defend the Defendants' claims for an easement across his property even though the Plaintiff was the victim of intentional trespasses by the Defendants. (A 132-139). This order was entered after Defendant FPC made an oral motion without notice to the Plaintiff during a hearing on Defendant FPC's Motion to Compel Plaintiff to Elect Remedies (A 129, 140).

The Plaintiff subsequently moved to quash the aforesaid order of the trial court contending that the court's decision to try all issues without a jury and alter the order of trial violated the Plaintiff's constitutional rights to a trial by jury and due process of law, as protected in the Seventh and Fourteenth Amendments of the United States Constitution (A 145). The Plaintiff's Motion to Quash was denied by the court

and the court proceeded to hold a non-jury trial on the equitable issues raised by the affirmative defenses of the Defendants on February 16, 1976 (A 149).

The Court's order denied the Plaintiff his right to go forward with the evidence on his case in chief in trespass against the Defendants before a jury. Instead, the Defendants were permitted to present their evidence to the court first on their affirmative defenses, which included their claim for a statutory way of necessity. The court considered evidence and subsequently entered its order holding that the Plaintiff would not be allowed a jury trial on the issue of trespass against the Defendants Folsom (A 152). After the court awarded a statutory way of necessity to the Defendants Folsom and had indicated its intentions to proceed with the jury trial against the

Defendant FPC straight through the weekend without a recess for the jury, the parties agreed to discharge the jury. Thereafter, the court received evidence on the question of trespass against FPC solely and considered the matter of damages for the taking of the right of way (A 158).

As supported by the record, including the proceedings at trial (A 145, 162), the Plaintiff vigorously objected to the court's denial of the Plaintiff's constitutional right to present his case in chief to the jury before the Defendants' affirmative defenses were heard and the denial of his right to opening and closing statements on his claims against the Defendants Folsom and FPC for trespass upon his property and a judgment to recover his property. On appeal, the Plaintiff raised these constitutional issues before the Second District Court of Appeal; however, the Plaintiff's

argument was not accepted (A 10).

During the course of the trial, when the court was receiving evidence of the Plaintiff's damages for the taking of his property pursuant to a statutory way of necessity granted by the court, the Plaintiff was not permitted to offer into evidence the attorneys' fees he incurred in defending his property rights. The Plaintiff did proffer said testimony for the record (A 113). However, the trial court refused to tax the Plaintiff's attorneys' fees against the Defendants as just compensation for the taking of his property on the ground that the fees were not provided for as taxable costs under Florida Statutes. The Plaintiff challenged the constitutionality of the aforesaid statutes, contending that his property was taken without just compensation (A 109). In addressing this issue, the trial court opined that in failing to provide for

attorneys' fees and costs the aforesaid statute was unconstitutional, but the trial judge stated he would leave the constitutional questions for the appellate courts (A 112).

On appeal, the Plaintiff again attacked the constitutionality of Florida Statutes, Sections 704.01(2) and 704.04 on the ground that the taking of the Plaintiff's property pursuant to the aforesaid statutes violated the Plaintiff's constitutional rights to due process of law, equal protection under the law, and redress of injury, as protected in the Seventh and Fourteenth Amendments to the United States Constitution. However, the Second District Court of Appeal specifically rejected the Plaintiff's constitutional attack and upheld the validity of the aforesaid statutes. In particular, the court declared: "Further, the trial court was correct in not awarding counsel fees to

the Scudders, as there is no right to an award of attorneys' fees to a servient landowner where a way of necessity is established. Estate of Hampton v. Fairchild Florida Construction Co., 341 So. 2d 759 (Fla. 1977)." (A 10). These same constitutional points were again presented to the Florida Supreme Court in Scudder's Petition for a Writ of Certiorari. The Supreme Court of Florida denied this petition on June 6, 1978 without opinion (A 1).

Notice of Appeal to this Court was timely filed on July 21, 1978 (A 126).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

In reviewing the record in the instant case it is apparent that the constitutional rights of the Plaintiff, Gilbert D. Scudder, a resident of New York State who owned real property in the State of Florida, were violated by the trial and the appellate courts of the State of Florida construing Florida Statutes, Sections 704.01(2) and 704.04. Substantial federal questions have been raised in the instant case as to whether the aforesaid constitutional rights of a nonresident can be transgressed by Florida state courts in the name of a statutory way of necessity. In essence, this case turns on the question of whether the public interest of the State of Florida as construed by the Florida State courts are paramount to the property rights of a non-resident as protected in the United States Constitution

and the Constitution of the State of Florida.

> Florida Statutes, Sections 704.01(2) and 704.04, are unconstitutional by permitting the taking of Plaintiff's property for the use and benefit of private property owners in violation of the Plaintiff's rights to due process of law.

The constitutional problems inherent in Florida Statutes, Sections 704.01(2) and 704.04 are readily apparent in reviewing the history of the aforesaid statutes, for the constitutionality of these statutes has been consistently challenged. Indeed, Section 704.01(2) was previously declared unconstitutional by the Florida Supreme Court in South Dade Farms, Inc. v. B. & L. Farms Co., 62 So. 2d 350 (Fla. 1952); Florida Statutes, Chapter 704, as amended in 1953, represents an attempt by the Florida legislature to cure the constitutional defects as pronounced in South Dade Farms.

In the South Dade Farms decision, supra, the Florida Supreme Court held that Florida Statutes, Section 704.01 violated the due process clauses of the Constitutions of the United States and the State of Florida. According to the court, a statutory way of necessity provided for under Section 704.01 amounted to the taking of property without just compensation.

Furthermore, the court specifically declared that Section 704.01 violated the due process clause by permitting the taking of private property for the use of a private owner. In addressing itself to this point the court stated:

> "Of course, in this instance the taking would have no semblance even of basis in the police power. It is purely a matter of taking from one private owner for the use of another private owner.
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> "When the state attempted, by the statute, to accomplish what would result were the present order enforced, its act constituted a violation of the provision that no state shall 'deprive any person of

> * * * property, without due process of law * * *.' Also the Florida constitutional provisions found in the Declaration of Rights that a person shall not 'be deprived of * * * property without due process of law * * *' would be violated, not to mention the provision that private property shall not be 'taken without just compensation.'" Id. at 351, emphasis added.

Clearly, therefore, the Florida Supreme Court in South Dade Farms, supra, held that Florida Statutes, Section 704.01 violated property owners' rights to due process of law by authorizing the taking of property without just compensation and by permitting the taking from one private owner for the use of another private owner.

In an attempt to cure the constitutional infirmity of Section 704.01, as enunciated by the Florida Supreme Court in South Dade Farms, supra, the Florida legislature amended Florida Statutes, Section 704.01, and further enacted Section 704.04, which provides that a hemmed-in property owner may petition

the circuit court for a statutory way of necessity if his neighboring owners do not consent to the use of their property; this section also provides compensation to be awarded to the servient landowner for the taking of his property in the event the court awards a statutory way of necessity.

The constitutionality of both Sections 704.01(2) and 704.04 was then challenged in Stein v. Darby, 126 So. 2d 313 (Fla. 1st DCA 1961). In the Stein decision, the aforesaid statutes were attacked on the ground that the statutory way of necessity primarily benefitted the private landowner rather than serving a public purpose. The First District Court of Appeal upheld the constitutionality of Florida Statutes, Sections 704.01(2) and 704.04, holding that the result contemplated by the aforesaid statutes serves a public purpose as distinguished from

a public benefit and considerations of public policy justify provision by the legislature of a means of access to landlocked property. Id. at 316-318. According to the court, the benefit to the private landowner was merely incidental to the accomplishment of the public use. Id. at 320.

In further justification of the constitutionality of the aforesaid statutes, the Court declared that Article XVI, Section 29, of the Florida Constitution implied that the legislature could delegate the power of eminent domain for the purpose of acquiring an easement to landlocked property on the condition that full compensation was paid to the owner. Id. at 321. Article XVI, Section 29, cited by the court, provided:

> Condemnation of property; compensation.--No private property, nor right of way shall be appropriated to the use of any corporation or individual until full compensation

> therefor shall be first made to the owner, or first secured to him by a deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law."

Without any question, therefore, the nature of the necessity provided for in Florida Statutes, Chapter 704, was clearly related by the appellate court to an eminent domain proceeding.

Although the decision of the First District Court of Appeal in Stein v. Darby, supra, apparently conflicted with the opinion of the Florida Supreme Court in South Dade Farms, supra, on the issue of taking property for the public use, the Florida Supreme Court denied certiorari in the Stein case. Stein v. Darby, 134 So. 2d 232 (Fla. 1961). According to the Florida Supreme Court, the Petition for Certiorari was premature as the facts of the case were not set and

no relief had been determined at that time. Id. at 237.

Recent decisions of the Florida Supreme Court in the Estate of Hampton v. Fairchild-Florida Construction Co., 341 So. 2d 759 (Fla. 1976) and Deseret Ranches of Florida, Inc. v. Bowman, 349 So. 2d 155 (Fla. 1977), have completely confused the grounds supporting the constitutionality of Florida Statutes, Sections 704.01(2) and 704.04. Until the Hampton decision, supra,, was decided, Florida Statutes, Chapter 704, was apparently constitutional on the ground that a statutory way of necessity served the public purpose in the nature of an eminent domain proceeding. In Hampton, however, the Florida Supreme Court specifically rejected the view that Chapter 704 related to an eminent domain proceeding. As stated by the Court, "(P)roceedings to establish a statutory way of necessity do not stand

on the same footing as condemnation actions...". Id. at 761. This deviation by the Florida Supreme Court from the traditional view served to justify the holding by the court that there is no basis for an award of attorneys' fees in statutory way of necessity actions, although attorneys' fees are provided in eminent domain proceedings. Id.

As statutory way of necessity proceedings no longer stood on the same footing as eminent domain proceedings by the Hampton decision, supra, the constitutionality of the taking was shaken. It could only be implied from the opinion of the Supreme Court that the legislature did not delegate its power of eminent domain to a property owner for the purpose of acquiring a way of necessity, and the taking was, therefore, for a private, rather than a public purpose.

The identical point was raised in Deseret Ranches of Florida, Inc. v. Bowman,

supra, where Florida Statutes, Chapter 704, was challenged on the ground that the statute permitted the taking of property for a private, rather than a public, purpose. A majority of the Supreme Court held that the statute's purpose is predominantly public and the benefit to the private landholder is incident to the public purpose. Id. at 156. However, two justices dissented from the majority opinion on the question of whether the taking serves the public purpose. In a well reasoned dissent, Justice Sundberg declared that there was no showing that any dominant public purpose was served through the operation of Florida Statutes, Chapter 704, but that its dominant purpose was actually to serve the interest of a landlocked private landowner.

A substantial federal question has therefore been raised by the decisions of the Florida state courts, including

the instant case, as to whether the statute permits the taking of property for a private, rather than for a public, purpose in violation of the servient landowner's rights to due process of law. The test in Florida has always been whether the purpose of taking private property was primarily public. The public purpose must not be merely incidental; "public benefit" is not synonymous with "public purpose." Grubstein v. Urban Renewal Agency, 115 So. 2d 745 (Fla. 1959).

In Grubstein, supra, the Florida Supreme Court sustained the constitutionality of the Urban Renewal Law providing for the rehabilitation, clearance, and redevelopment of slums and blighted areas in the City of Tampa in accordance with urban renewal plans, holding that it served the public purpose. The dominant public purpose was clearly stated to be the clearance of

slum areas which would improve traffic and safety conditions in the area, eliminate the disease, crime, fire hazard and other problems incident to slum conditions, and generally benefit the health, safety, morals and general welfare of all the citizens of the City of Tampa. Id. at 749.

In the case sub judice a "dominant public purpose" has not been shown to be served through the operation of Florida Statutes, Chapter 704. Obviously, the dominant purpose of the aforesaid statute is to serve the interests of a private property owner. Any benefit to the public derived from Sections 704.01(2) and 704.04 is incidental to the benefit flowing to the private landowner; a statutory way of necessity, therefore, provides at most a "public benefit" and not a "public purpose."

In the instant case, it is equally apparent that the property of the Plain-

tiff was taken for the primary benefit of the Defendants Folsom and FPC. The Defendants did not even establish that they were denied access to a public road by other adjacent property owners and it was never shown that a statutory way of necessity of Plaintiff's land would benefit the public. Citizens of the State of Florida are not affected or benefitted by the award of a statutory way of necessity to the Defendants of an easement across the Plaintiff's property, and the mere declaration of Florida Statutes, Section 704.01(2) that it is "based on public policy, convenience, and necessity" does not amount to a taking for "the public purpose." The aforesaid statutes which authorize the taking of the Plaintiff's property are therefore unconstitutional by violating the Plaintiff's due process rights as protected in the Fourteenth Amendment to the United States Constitution and his

property rights as guaranteed in Article I, Declaration of Rights, Section 2 and Section 9, and Article X, Section 6(a) of the Constitution of the State of Florida.

The danger of this infringement upon the due process rights and basic property rights of a landowner, particularly a property owner who is a citizen of a sister state, such as the Plaintiff, was enunciated by Justice Sundberg in his dissent to the majority opinion in Deseret Ranches of Florida, Inc. v. Bowman, supra. Justice Sundberg cautioned that

> "It is an odious concept indeed that the awesome eminent domain power of the sovereign may be utilized by an individual to take for his own private use the private land of his neighbor against the will of the neighbor, regardless of the requirement that full compensation shall be paid. It is no consolation to assert that the right of way easement is temporary and shall exist only so long as it is reasonably necessary for the purposes stated in the statutes. If Section 704.01(2), Florida

> Statutes, is held not to violate Article X, Section 6(a), then there can be no rational basis to restrict the power of the legislature to delegate the authority to take permanently."

Justice Sundberg's remarks are well taken; at its very essence, the statutory way of necessity imposed upon the Plaintiff's land by Florida Statutes, Chapter 704, is simply a taking of a person's land by one private property owner for his benefit to the detriment of the owner whose land is being taken. If the taking no longer stands on the same footing as an eminent domain procedure, the statutory way of necessity in this case occurs without even the auspices of an act by or on behalf of the citizens of the State of Florida. As there is no showing of any dominant public purpose to be served through the operation of Florida Statutes, Chapter 704, the statute is unconstitutional on its face.

The manner of the taking of Plaintiff's property pursuant to Florida Statutes, Sections 704.01(2) and 704.04 violated Plaintiff's rights to due process of law.

A review of the facts in the instant case as set forth in the record on appeal demonstrates that the manner of the taking of the Plaintiff's property pursuant to a statutory way of necessity under Florida Statutes 704.01(2) and 704.04 blatantly violated the Plaintiff's rights to due process of law as protected in the Fourteenth Amendment to the United States Constitution. A substantial federal question exists as to violation of the Plaintiff's due process rights by the conduct of the Defendants and the procedure followed by the trial court with respect to the taking of Plaintiff's property.

Florida Statutes, Sections 704.01(2) and 704.04 set forth the procedure to be followed by a property owner who is

deprived of a practicable route of ingress or egress to his property and has need for a statutory way of necessity. According to the aforesaid statutes, such a property owner may petition the circuit court for a statutory way of necessity when his neighbor, owner or owners objects or refuses to permit his use of their property. The obvious intent of the Florida legislature, expressed in Florida Statutes, Sections 704.01(2) and 704.04, is for the hemmed-in owner to petition the court for relief only when he has no other alternative to gain ingress and egress to a public road from his property.

The aforesaid procedure for the statutory easement obviously was intended to protect the due process rights of the property owner whose land is subject to be taken by an award of a statutory way of necessity. Implicit in the language of the statute is the

requirement that the hemmed-in landowner has, in fact, been denied access to a public road by his surrounding neighbors. If the neighbors object or refuse the use of their property, the circuit court may then, upon petition of the hemmed-in party, rule whether a statutory way of necessity should be granted and determine which route is most practicable.

The record in the instant case reveals a blatant trespass by the Defendants Folsom and Florida Power Corporation upon the Plaintiff's property. The procedure set forth in Florida Statutes, Sections 704.01(2) and 704.04 as previously described, was never followed by the said Defendants. The Plaintiff was never contacted by the Defendants for permission to cross his property, nor were Defendants Folsom refused access by other adjoining property owners, and the Plaintiff never

had an opportunity to consent or object to the use of his property by the Defendants (A 164, 168, 175-178).

Further, the Defendants never petitioned the circuit court to have a judicial determination as to whether they were hemmed-in as required by the statute to entitle them to the relief provided until after they had first unlawfully trespassed upon the Plaintiff's property. Without first contacting the Plaintiff or petitioning the circuit court for statutory relief, the Defendants Folsom built a clay road with six inches to twelve inches depth of clay, approximately twenty feet wide and over 1,500 feet in length upon the lakefront portion of Plaintiff's property (A 179-184). Upon learning of the trespasses upon his property the Plaintiff erected a fence and posted "no trespassing" signs to protect his property. The fence was torn down within 48 hours after its

construction by the Plaintiff (A 185-188).

Notwithstanding their actual knowledge of the Plaintiff's objection to the use of his property, the Defendants Folsom blatantly ignored the Plaintiff's property rights and continued to trespass upon the Plaintiff's property (A 189-196). Further, the Defendants Folsom directed the Defendant Florida Power Corporation to trespass upon Plaintiff's property and construct a utility line to their property (A 191-194). Three poles with lines traversing the shore line of Flat Lake were placed on the Plaintiff's property on or about November 6, 1973, by the Defendant Florida Power Corporation's employees, because the employees followed a company policy of not making any effort to look at the public records of land ownership or contacting a landowner before installing a distribution line upon the Plaintiff's property (A 197-239).

The Defendants Folsom and FPC never petitioned the court for a statutory way of necessity until after the Plaintiff filed suit against the said Defendants in the Circuit Court of Lake County for wilful trespass upon his property; the request for a statutory easement was raised by the said Defendants as an affirmative defense to the Plaintiff's action in an effort to purge themselves after the fact of their intentionally illegal acts (A 46-77).

From these facts, it is apparent that the subsequent taking of the Plaintiff's property by the trial court pursuant to Florida Statutes, Sections 704.01(2) and 704.04 amounted a taking of the Plaintiff's property without due process of law after an unlawful trespass, because the Defendants Folsom and FPC had not followed the required procedure for petitioning the court for statutory relief and therefore did not have

standing to raise the affirmative defense of a statutory way of necessity to absolve themselves of their responsibility for their intentional trespass upon the Plaintiff's property. This abuse of the Plaintiff's due process rights was sanctioned by the trial court in awarding the statutory way of necessity and the appellate courts affirming the aforesaid easement in the face of the Plaintiff's constitutional attacks on the taking of his property pursuant to the aforesaid statutes.

It should be readily apparent to this Court that a substantial federal question exists as to whether procedure followed by the Defendants in taking the Plaintiff's property pursuant to Florida Statutes, Sections 704.01(2) and 704.04, violated the Plaintiff's rights to due process of law. The aforesaid statutes, as construed by the trial court and the Florida appellate courts below, author-

ize the taking, notwithstanding the Defendants' flagrant trespass, and are therefore unconstitutional because they deny the Plaintiff his rights to due process as protected by Section Twelve of the Declaration of Rights of the Constitution of the State of Florida and the Fourteenth Amendment to the Constitution of the United States. To allow the Plaintiff's property to be taken under these statutes in derogation of the proscribed procedure for petitioning for relief under the aforesaid statutes violates his aforementioned constitutional rights. As the Defendants illegally initiated the taking by committing a trespass upon the Plaintiff's property, the award of the statutory way of necessity, pursuant to Florida Statutes, Sections 704.01(2) and 704.04, which are statutes in derogation of the common law which have not been strictly construed by the Florida courts

but, instead, have been construed to violate the Plaintiff's constitutional rights as aforesaid. For these reasons, Florida Statutes, Sections 704.01(2) and 704.04 should be declared unconstitutional by this Court and the decisions of the Florida courts below reversed.

> Florida Statutes, Sections 704.01(2) and 704.04 are unconstitutional because these statutes fail to provide just compensation for the taking of the Plaintiff's property in violation of the Plaintiff's rights to due process of law. In the alternative, the Florida state courts below violated the Plaintiff's due process rights by failing to tax attorneys' fees against the Defendants for the expenses the Plaintiff incurred in proving his damages and defending the taking of his land.

As stated earlier, in 1952 the Florida Supreme Court declared Florida Statutes, Section 704.01 (1951) unconstitutional on the ground that the aforesaid statute ran afoul of the due process clause by permitting the taking

of private property for a private, rather than public purpose, and by reason of its failure to provide just compensation for the taking of property. South Dade Farms, Inc v. B&L Farms Company, supra, at 351. This fatal constitutional defect has not been remedied by the Florida legislature in the amended statute, Florida Statutes, Chapter 704 (1953), nor has the Florida Supreme Court ruled that the amended statute as passed corrects this defect.

While Florida Statutes, Section 704.01 was amended in 1953 in an attempt to conform with the South Dade Farms decision, supra, a substantial federal question is raised as to whether Florida Statutes, Chapter 704, violates a person's constitutional rights to due process of law when it authorizes the taking of private property as a "statutory way of necessity" without providing the injured landowner just compensation.

At the heart of this problem lies an inconsistency in the opinions of recent decisions, by the Florida Supreme Court, including the case sub judice, upholding the constitutionality of the aforesaid statutes but denying the right to tax attorneys' fees as just compensation for the taking of property pursuant to a statutory way of necessity.

The root of this problem is found in the decision of the First District Court of Appeal in Stein v. Darby, supra, when that court pronounced that the legislature delegated the power of eminent domain to a landlocked property owner for the purpose of acquiring an easement on the condition that full compensation was paid to the owner. Id. at 321. In support of this position, the court cited Article XVI, Section 29, of the Florida Constitution, which provided that no private property could be appropriated until full compensation

as determined by a jury is first paid to the owner. Id. The nature of a statutory way of necessity proceeding under this statute was therefore clearly identified by the appellate court as a proceeding in eminent domain.

In Florida, attorneys' fees are recognized as a cost to be awarded in eminent domain cases pursuant to Florida Statutes, Section 73.091, regardless of whether the condemnee's land is actually taken. Dade County v. Oolite Rock Co., 311 So. 2d 699 (Fla. 3d DCA 1965). Moreover, Florida appellate courts have traditionally held that just compensation requires that attorneys' fees be awarded to the property owner in eminent domain proceedings and inverse condemnation actions. Jacksonville v. Schumann, 223 So. 2d 749 (Fla. 1st DCA 1969); Broward County v. Bouldin, 114 So. 2d 737 (Fla. 3d DCA 1959). As the authority for the taking by a statutory

way of necessity emanated from the legislature's power of eminent domain, it would logically seem that just compensation under Florida Statutes, Section 704.04 required the taxing of attorneys' fees, similar to eminent domain proceedings.

Support for the position that attorneys' fees should be included as just compensation for property taken by a statutory way of necessity is found in federal and state decisions speaking to due process of law guarantees where the states exercise their police power. The states do not have the power and authority to appropriate private property for a public use without paying just compensation to the property owner whose land the state is taking. The United States Constitution and supporting decisions uphold the right of an owner of land to receive reasonable compensation when his private property is appropriated for

public use. Chicago B&Q Railroad Co. v. Illinois, 200 U.S. 561, 26 S.Ct. 341 (1906); Lamm v. Volpe, 449 F. 2d 1202 (10th Cir. 1971); State v. Stewart, 120 So. 335 (Fla. 1929). While the constitutional guarantee against the taking of private property without just compensation has been restricted by some jurisdictions to eminent domain proceedings, the Florida Supreme Court has given greater significance and broader effect to these due process of law rights. State v. Stewart, Id. at 349.

The logic for providing attorneys' fees as just compensation for the taking of private property was expressed in the opinion of In re Board of Rapid Transit Railroad Commissioners, 128 Appellate Division of New York 103, 112 N.Y.Supp. 619 (S.Ct. of N.Y. 1908), where the court noted that such compensation was amply justified by the equities of the situation. As stated by the court, the

property is taken from an unwilling landowner through the exercise of the high powers of the state; the spirit of the Constitution requires that he should not be required to lose his property without being compensated for all the necessary expenses, including attorneys' fees incurred in defending his property rights. Id. at 636, 637.

Notwithstanding these principles as enunciated by this Honorable Court and other jurisdictions, including the Supreme Court of Florida, as aforesaid, and in the face of the clear language of Stein v. Darby, supra, the Second District Court of Appeal and the Florida Supreme Court, in construing Florida Statutes, Sections 704.01(2) and 704.04, have ruled in the instant case that attorneys' fees were not recoverable in statutory way of necessity actions. These courts have apparently relied upon the decision of the Florida Supreme

Court in Estate of Hampton v. Fairchild Florida Construction Co., 341 So. 2d 759 (Fla. 1976). The Florida Supreme Court concluded in the Hampton decision that proceedings to establish a statutory way of necessity do not stand on the same footing as condemnation actions by the State of Florida in its sovereign capacity. Id at 761. Referring to the proceeding for a statutory way of necessity, the Court noted that the present situation differs from the delegation of the power of eminent domain to railroad, canal, telephone, and telegraph companies. Id., n.4.

In the latest decision by the Supreme Court of Florida concerning the constitutionality of Florida Statutes, Chapter 704, Deseret Ranches of Florida, Inc. v. Bowman, supra, the Florida Supreme Court contradicted its decision in Hampton, supra, in upholding the constitutionality of Florida Statutes,

Sections 704.01(2) and 704.04 on the specific ground that the statutes authorized the taking of private property for a public, rather than a private, purpose. Notwithstanding the Hampton decision, supra, the "public purpose" nature of the statutory way of necessity proceeding can be characterized only as an exercise of the power of eminent domain. In Adams v. Housing Authority, 60 So. 2d 633 (Fla. 1953), the Florida Supreme Court defined the power of eminent domain as "(T)hat sovereign power to take property for a public use or purpose, and this cannot even be done without just compensation." (Emphasis supplied.)

In the very words of the Florida Supreme Court in Adams v. Housing Authority, supra, a taking of property for a public use is an exercise of the power of eminent domain and just compensation must be awarded for the

taking of the property. Further, the Florida legislature and the Florida Supreme Court have recognized that attorneys' fees must be awarded as just compensation to a property owner in an eminent domain proceeding. It follows, therefore, that a taking of property as a statutory way of necessity for the public purpose is an exercise of the power of eminent domain and attorneys' fees must be awarded as just compensation for the taking. The Deseret opinion therefore conflicts with the clear language of the Supreme Court in Hampton, supra, disclaiming any relationship of a statutory way of necessity proceeding to a condemnation action by the State of Florida in its sovereign capacity.

In considering the violation of the Plaintiff's due process rights in the case sub judice, several alternative courses of action are open to this Court. To begin with, Florida Statutes,

Chapter 704, as construed by the Florida appellate courts in the instant case, violates the Plaintiff's rights to due process of law by failing to provide just compensation for the taking of his property. The statutes should be declared unconstitutional on the ground that a statutory way of necessity is an exercise of the power of eminent domain and Florida Statutes, Chapter 704, fails to provide attorneys' fees as just compensation for this taking of property as required by the Florida Constitution (see Broward County v. Bouldin, supra,) and the Fourteenth Amendment to the United States Constitution.

In the alternative, if this Court holds that Florida Statutes, Sections 704.01(2) and 704.04, are constitutional as providing just compensation to the affected landowner, it should rule that the Florida courts below violated the Plaintiff's due process rights by fail-

ing to award Plaintiff his reasonable expenses, including attorneys' fees, as contemplated under the statute. In this event, this Court should instruct the trial court below to award the Plaintiff his reasonable attorneys' fees as just compensation for defending his property rights at trial and on appeal.

In the event this Court determines that Florida Statutes, Chapter 704, does not contemplate an exercise of the power of eminent domain and that attorneys' fees are not to be awarded as just compensation, the statutes must also be declared unconstitutional as violating the due process rights of the Plaintiff. If a statutory way of necessity is not a delegation of the power of eminent domain, then Florida Statutes, Sections 704.01(2) and 704.04 blatantly permit a taking of private property for a private purpose, rather than a public purpose, in violation of the Plaintiff's due

process rights as protected under the Fourteenth Amendment of the United States Constitution and Article I, Declaration of Rights, Section 9, of the Constitution of the State of Florida.

Finally, the unique facts of the instant case demonstrate that the taking of the Plaintiff's property by the Defendants Folsom and FPC, through the courts of the State of Florida, transgress the Plaintiff's rights to due process of law. Even if Florida Statutes, Chapter 704, is considered to be constitutional by this Court, the procedural due process guarantees provided for in Florida Statutes, Section 704.04, have been intentionally ignored by the Defendants Folsom and FPC in the instant case, as described earlier in this brief. The aforesaid trespass by the Defendants deprived them of any standing to petition for relief under Florida Statutes, Chapter 704.

Further, the award of the statutory way of necessity as affirmed by the appellate courts below in the face of the outrageous trespass committed by the Defendants made a mockery of any due process rights afforded to the Plaintiff pursuant to Florida Statutes, Section 704.04. On these grounds, therefore, the Florida courts below violated the Plaintiff's due process rights as protected in the Constitutions of the United States and the State of Florida by authorizing the statutory way of necessity across the Plaintiff's land, notwithstanding the Defendants' trespass.

Any other interpretation by this Court would result in the contradiction and confusion of logic that is so readily apparent in the Hampton and Deseret decisions of the Florida Supreme Court, supra. Either Florida Statutes, Sections 704.01(2) and 704.04 are uncon-

stitutional, or the Plaintiff is entitled to be awarded his attorneys' fees as just compensation has been determined by the Florida courts in all other instances in which private property is taken. If the statutes are unconstitutional the Defendants must be found by this Court to have wilfully trespassed upon the Plaintiff's property and instructions should be entered for a new trial on the issue of compensatory and punitive damages to be assessed against the Defendants Folsom and FPC.

Florida Statutes, Sections 704.01(2) and 704.04, as construed by the Florida state courts below, are unconstitutional by permitting the taking of the Plaintiff's property in violation of his rights to equal protection under the law.

The rulings of the Florida Supreme Court in Hampton and Deseret, supra, create different standards of relief for real property owners that depend upon the method by which the property is

taken. Those fortunate enough to have their property taken by eminent domain or inverse condemnation proceedings will be afforded their due process rights and will be entitled to just compensation, including their attorneys' fees, while those unfortunate enough, like the Plaintiff, to have their property taken by a statutory way of necessity under Florida Statutes, Chapter, 704, are not protected and will not receive just compensation, including their attorneys' fees. Such a discriminating situation not only transgresses the due process rights of the Plaintiff; it also violates his constitutional guarantees to equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and provided by Article I, Section 2, Declaration of Rights, Florida Constitution.

This arbitrary discrimination is

particularly evident in the instant case when attention is focused upon the conduct of the Defendant Florida Power Corporation. If the Defendant FPC had initiated condemnation proceedings against the Plaintiff for a utility easement across the Plaintiff's property the Plaintiff would have been afforded his due process guarantees for the taking of his property and just compensation would include attorneys' fees. Certainly, FPC would not have constructed its distribution line upon the Plaintiff's property until a court order had been entered granting an easement to FPC.

In the instant case, however, the property rights of the Plaintiff were intentionally violated by the wilful trespass of the Defendant FPC upon the Plaintiff's property but the Defendant was permitted a statutory way of necessity across the Plaintiff's land without

being obligated to pay the Plaintiff's attorneys' fees and without an order of taking having been first obtained. Based upon the testimony and the evidence presented at trial, the trial court ruled that FPC followed a policy when installing its distribution lines across private property that wilfully violated the property rights of landowners in the state, including the rights of the Plaintiff (A 94). Legal descriptions were never checked, maps and aerial photographs were not reviewed, and surveys were not taken (A 197-239).

As a matter of fact, the trial court found that no single employee of FPC admitted he made a mistake in failing to ascertain the landowners and obtain their consent prior to going upon their land and installing its lines; the cause of error was blamed on the <u>policy of FPC</u> for the installation of the distribution line (A 96). According to

the trial court, the evidence revealed that FPC took risks at the expense of property owners by placing its distribution lines and poles on property without bothering to check courthouse landownership records, legal descriptions, aerial photographs or maps, all of which were readily available to them and were, in fact, used when rights of way were sought for transmission lines (A 197-239).

In spite of this blatant trespass, the trial court and the appellate courts below construed Florida Statutes, Chapter 704, to authorize the taking of the Plaintiff's property in the instant case as a means of egress and ingress for the Defendants Folsom and to provide an easement for electrical service by the Defendant FPC for the benefit of the Defendants Folsom. The Plaintiff was not afforded his due process rights as provided in Florida Statutes, Chapter

704, which required the Defendants to first petition the court for relief, and the Plaintiff was denied his right to an award of attorneys' fees as just compensation for the taking of his property. In contrast to the outrageous conduct of the Defendants FPC and Folsom in the manner in which they trespassed on the Plaintiff's property in the instant case in the face of the Plaintiff's signs, fence, and expressed request for Folsom to stay off his property, if the same property of the Plaintiff were acquired by eminent domain proceedings initiated by the Defendant FPC through recognized legal process, the Plaintiff would have been assured his rights to due process of law prior to the taking of his property and he would have been entitled to his attorneys' fees incurred in defending his property rights as just compensation for the taking of his property.

It is apparent, therefore, that

Florida Statutes, Sections 704.01(2) and 704.04, as construed by the Florida courts below, create an arbitrary and unreasonable class of property owners in the State of Florida which denies due process of law, including just compensation for the taking of property, to those property owners whose land is subject to a statutory way of necessity. In Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509 (1962), this honorable Court provided that the test for the validity of classification created by statutes, as in the case sub judice, is whether or not the line drawn is rational. Further, a statutory classification must bear some rational relationship to a legitimate state purpose. Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459 (1977). This Court has traditionally exercised strict scrutiny for equal protection purposes where statutory classifications approach sensitive and fundamental

rights. Id. at 767.

Turning to the case sub judice, a substantial federal question exists as to whether the statutes in question have created an arbitrary and unreasonable classification in violation of the Fourteenth Amendment and the aforesaid decisions of this Court construing the Equal Protection Clause. There is no logical basis to a statute that discriminates against a class of property owners whose land is taken pursuant to a statutory way of necessity by denying their right to procedural due process guarantees and to just compensation for the taking of their property. The Florida courts below have forgiven the trespass of the Defendants and the wilful transgression of the Plaintiff's property rights by the said Defendants in the name of a statutory way of necessity, and have added further insult by denying the Plaintiff his right to tax

attorneys' fees as just compensation for the taking of his property. Certainly, this discrimination against the Plaintiff and similar property owners bears no rational relationship to any legitimate state purpose. As the State of Florida, through Florida Statutes, Chapter 704, construed by the Florida courts below, patently violates the Plaintiff's rights to equal protection under the law, the aforesaid statute must be declared unconstitutional by this Court.

CONCLUSION

The taking of Plaintiffs' property as a statutory way of necessity pursuant to Florida Statute Chapter 704, as construed by the Florida courts, raises substantial federal questions as to an apparent violation of the Plaintiffs' rights to due process of law and equal protection under the law as protected by the Fourteenth Amendment to the United States Constitution. The Plaintiffs' fundamental property rights have been violated by the enforcement of the Statute by the Florida courts below and rights of similar property owners will continue to be violated unless this Court takes jurisdiction of this Appeal.

For reasons set forth above, Florida Statute, Sections 704.01(2) and 704.04 are repugnant to the Fourteenth

Amendment of the United States Constitution by taking private property for private, rather than public purpose, in violation of the Plaintiffs' rights to due process of law; further, the manner of taking of Plaintiffs' property in the case sub judice as upheld by the Florida courts violates the Plaintiffs' due process rights; in addition, the Statutes transgress Plaintiffs' rights to due process of law by denying just compensation for the taking of his property and the Statutes create an arbitrary classification of property owners whose property is taken by statutory way of necessity in violation of their rights of due process of law.

Furthermore, the opinions of the Florida Supreme Court and the District Courts of Appeal construing the aforesaid Statutes have created much confusion as to the constitutionality of the Statutes.

By taking jurisdiction of this Appeal, this Court can protect the fundamental property rights of landowners of this state by ruling on the constitutionality of Florida Statutes, Chapter 704, and stating the specific grounds for the holding, regardless of the validity of the statute.

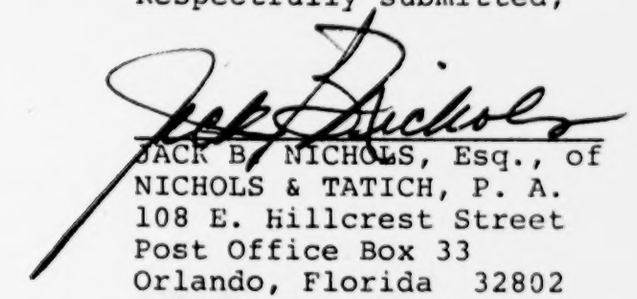
The United States Constitution protects the rights of the citizens of this country to own real property. A citizen's property may only be taken for public uses and purposes, but the owner must be made whole again for that which is taken from him for a public purpose. Here, a parcel of land owned by the Appellant Scudder 30 feet wide and over 1,500 feet long consuming over one acre of lakefront land has been taken from him against his will for a private purpose following an intentional tort in trespass and the Appellant has been granted

only a nominal dollar award for the land. This sum does not begin to make him whole again since he has expended more than $30,000.00 in defending his constitutional rights, not to mention the court costs and appellate costs that Defendant Florida Power Corporation seeks from the Appellant Scudder because it "won" its appeal in the state courts. The Appellant's last resort for justice lies with this honorable Court.

Accordingly, this Court should enter its Order noting probable jurisdiction of the case sub judice. By taking jurisdiction of the instant case, the constitutional rights of property owners of the State of Florida will be safeguarded and, further, the Bar of this state will be greatly benefited by a clarification of the constitutional issues concerning the taking of property by a statutory way of necessity

as provided in Florida Statutes, Chapter 704.

Respectfully submitted,



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PROOF OF SERVICE

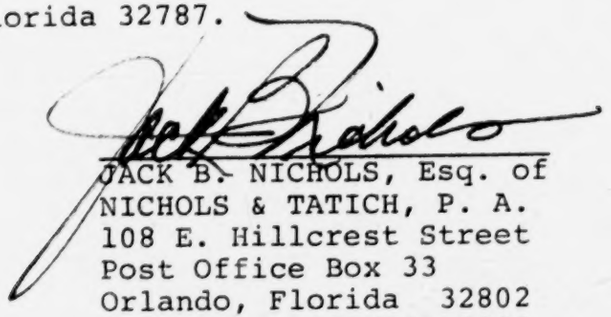
I, JACK B. NICHOLS, of Nichols & Tatich, P. A., attorneys for Gilbert D. Scudder, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 5th day of September, 1978, I served three copies of the foregoing Statement of Jurisdiction on each of the several parties thereto, as follows:

On FLORIDA POWER CORPORATION, L. M. FOLSOM and PAULINE FOLSOM, by hand delivery to their respective attorneys of records, as follows:

To C. BRENT McCAGHREN, Esquire, Attorney for Florida Power Corporation, 250 Park Avenue South, Winter Park, Florida 32789;

To JOHN H. RHODES, JR., Esquire, Attorney for L. M. Folsom and Pauline

Folsom, 535 South Dillard Street, Winter Garden, Florida 32787.



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78-377

THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

GILBERT D. SCUDDER,

Appellant,

vs.

FLORIDA POWER CORPORATION, a Florida corporation, L. M. FOLSOM and PAULINE FOLSOM, his wife.

Appellees.

APPENDIX TO

APPELLANT'S JURISDICTIONAL STATEMENT

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CONTENTS OF APPENDIX

SUPREME COURT OF FLORIDA

Filed: TUESDAY, JUNE 6, 1978

GILBERT D. SCUDDER, et ux,

Petitioners, Case No. 52,856

v. DISTRICT COURT OF APPEAL, SECOND DISTRICT

FLORIDA POWER CORPORATION, et al., 76-1005 76-1006

Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

OVERTON, C.J., ADKINS, BOYD, ENGLAND and SUNDBERG, JJ., concur.

A True Copy

TEST

Sid J. White
Clerk Supreme Court

By /s/Tanya Carroll
Deputy Clerk

TC
cc: Hon.William A. Haddad, Clerk
Hon.Wallace E. Sturgis, Jr., Judge
Hon.James C. Watkins, Clerk

R. Wayne Evans, Esquire
Jack B. Nichols, Esquire
John H. Rhodes, Jr., Esquire
C. Brent McCaghren, Esquire

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JULY TERM, A. D. 1977

FLORIDA POWER CORPORATION

Appellant,

v. CASE NO. 76-1005

GILBERT D. SCUDDER, L. M. FOLSOM and PAULINE FOLSOM his wife,

Appellees

L.M.FOLSOM and PAULINE FOLSOM, his wife,

Appellants,

vs. CASE NO. 76-1036

GILBERT D. SCUDDER, et al.,

Appellees.

Opinion filed September 16, 1977.

Appeals from the Circuit Court for Lake County; Wallace E. Sturgis, Jr., Judge

C. Brent McCaghren of Winderweedle, Haines, Ward & Woodman, Winter Park, for Florida Power Corporation

Jack B. Nichols and R. Wayne Evans of Nichols & Tatich, Orlando, for Gilbert D. Scudder.

John H. Rhodes, Jr., Winter Garden, for L. M. Folsom and Pauline Folsom.

SCHEB, Judge.

The principal issue in these consolidated appeals is whether the trial court erred in awarding compensatory and punitive damages against a utility company, Florida Power Corporation (FPC) for placing its electric poles and lines across privately owned lands without permission of the owners. Additionally, we address challenges to the compensation awarded the servient owners for a statutory way of necessity, as well as the court's rejection of claims to a common law easement or prescriptive right by the landowners served by the utility lines.

The essential facts are these: In April 1973 L. M. and Pauline Folcom acquired an eighty-acre tract of land in

Lake County. Since the tract was land-locked, the Folsoms proceeded to construct a clay road from their property across land owned by Gilbert D. and Irene J. Scudder to an existing county road. While building the road the Folsoms requested FPC to install electric services to their new premises. A customer service representative of FPC, familiar with the area, visited the Folsoms who were in the process of having a road graded across the Scudders' property. Piles of clay were along the road and Mr. Folsom told FPC's representative that he was putting in the road and that it was his clay, and even mentioned how much it was all costing him. Based on these facts, the FPC representative mistakenly assumed the Folsoms owned or at least had legal right to use the property. Mr. Folsom never told the FPC representative that he did not own the property, nor did he disclose that he had no legal right to place the roadway

across it. Acting upon Folsom's request and representations, and without making any independent determination of the ownership of the lands, FPC's employees erected poles and distribution lines to serve the Folsoms' needs. No surveys were made, permits obtained, or land records checked by FPC before its installation was accomplished.

Upon learning the Folsoms were building the road, in October 1973 the Scudders (who lived in New York) contacted the Folsoms advising them the road was in violation of their property rights. The Scudders also had a fence erected and signs posted to protect their property. Nevertheless, the Folsoms disregarded these warnings and in November 1973 permitted FPC to install their lines.

The Scudders sued FPC in one action and the Folsoms in another. In the former action they charged that FPC wrongfully placed its utility poles and distribution

lines on their lands; in the latter they contended the Folsoms trespassed by constructing and using a road on their lands. In the latter suit the Scudders alternatively prayed that should the Folsoms be entitled to a statutory way of necessity, that the court establish the same and award them reasonable compensation and attorneys' fees. Scudders sought compensatory and punitive damages in both actions.

FPC and the Folsoms answered and counterclaimed, asserting a right-of-way over the Scudders' property on theories of: (1) prescriptive right; (2) implied common law right-of-way; or (3) statutory way of necessity. Prior to trial, FPC filed a cross-claim against the Folsoms, demanding indemnity for any damages that it might be required to pay to the Scudders.

As the causes proceeded to trial they were consolidated. Unfortunately,

Mrs. Scudder died in the interim, but Mr. Scudder continued the actions.

The trial court first heard evidence on the Folsoms' affirmative claims. After rejecting their claims of prescriptive right and implied common law right-of-way, the court concluded the Folsoms were entitled to a statutory way of necessity thirty feet in width across Scudder's lands as "reasonably necessary for ingress and egress by persons, vehicles, stock and electricity and telephone services thereon."

Thereafter, by agreement of the parties the court in a nonjury trial considered the remaining issues and awarded the Scudders $7,400 compensation for the statutory way of necessity. FPC was held liable to them for $500 compensatory and $25,000 punitive damages for its trespass. The court determined that two of the utility poles were placed nine and twelve feet, respectively, outside the areas

designated by the court. FPC was ordered to relocate the poles and lines within the confines of the way of necessity. The trial court denied FPC's cross-claim for indemnity against the Folsoms.

The trial court correctly determined Folsoms did not acquire any common law easement. There was no evidence that any common source of title between the dominant and servient estates had caused the Folsom's property to be landlocked. See Hanna v. Means, 319 So. 2d 61 (Fla. 2d DCA 1975); Stein v. Darby, 126 So. 2d 313 (Fla. 1st DCA 1961).

Moreover, the trial court did not err in its ruling that the Folsoms failed to establish a prescriptive right. To do so a claimant must show an identifiable parcel of land has been used openly, notoriously, continuously, and uninterruptedly for a period of twenty years. Zetrouer v. Zetrouer, 103 So. 625 (Fla. 1925). The Folsoms had only recently

commenced their use and the trial judge properly concluded that the uses of the Scudders' land by Folsoms' predecessors had been permissive rather than adverse. This defeats the claim by prescription. See Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73 (Fla. 1974); Burdine v. Sewell, 109 So. 648 (Fla. 1926).

The trial judge correctly awarded the Folsoms a statutory way of necessity under Section 704.01(2), Florida Statutes (1975).

The award of $7,400 challenged by Scudder as inadequate and by the Folsoms as excessive, is sustained by competent and substantial evidence. Further, the trial court was correct in not awarding counsel fees to a servient landowner where a way of necessity is established. Estate of Hampton v. Fairchild-Florida Construction Co., 341 So.2d 759 (Fla. 1977).

The trial judge could just as logic-

ally have awarded a way of necessity wide enough to include the existing utility lines. He did not, and we cannot say he erred as a matter of law in failing to do so. Rather, we think that determination of the statutory way of necessity under Section 704.01(1) is a matter where the trial judge enjoys considerable discretion. An abuse of that discretion has not been shown.

We agree that FPC committed a trespass when it placed its poles and lines on the Scudders' lands. The trial court erred in awarding punitive damages against FPC.

The trial court found:

> The evidence thus reveals a policy of the Defendant FLORIDA POWER CORPORATION that was so careless and unconcerned with the rights of property owners that it would proceed to establish a distribution line in the face of a series of facts that no right of way in fact existed for the placement of the distribution poles.

Concluding that FPC had willfully abused the rights of the Scudders, the court

awarded them $25,000 punitive damages.

Evidence was introduced to show FPC followed the customary practice of utility companies in Lake County by requesting the Folsoms to relate any disputed boundaries or ownership problems. While FPC concedes a mistake occurred, it claims it was misled by Folsom who did not disclose his lack of ownership of the lands. Moreover FPC points out that Folsom, who observed the installation of electric power lines across the Scudders' property did not even notify FPC of the protest letters he had received from the Scudders' attorneys.

A public utility should at least check the public records to determine the legal ownership of the lands on which it contemplates installing its lines. Prudence certainly dictates that a utility must obtain necessary easements or other legal sanctions from those whose property rights are to be affected before its poles and lines are installed.

Although mistaken and even careless about determining the ownership of the lands where it installed its poles and lines, Florida Power's conduct was not of a wanton character and was certainly not the type of outrageous wrong which warrants imposition of punitive damages. FPC's motivation was to bring utility service to a customer as it is obligated to do under its franchise. Its poles were located near an existing roadway over which its customer exercised apparent control. Its customers, the Folsoms, were ultimately found to be entitled to substantially the same area by way of necessity. Finally, the installation did not result in any damage to any structures or crops.

In Winn and Lovett Grocery Co. v. Archer, 171 So. 214, 222-23 (Fla. 1936), the classic case on punitive damages, the Florida Supreme Court said:

> Punitive or exemplary damages are allowable, however, solely as punishment or "smart money" to be inflicted for the malicious or wanton state of mind with which the defendant violated plaintiff's legal right, and can only be imposed in cases where either by direct or circumstantial evidence some reasonable basis for an inference of wantonness, actual malice, deliberation, gross negligence, or utter disregard of law on defendant's part may be legitimately drawn by the jury trying the case.

While the Scudders protested actions by the Folsoms, the record does not disclose such protest was communicated to FPC either by the Scudders or the Folsoms. Although we do not approve FPC's methods which resulted in a trespass on the lands owned by the Scudders, it would be unfair to impose what amounts to a civil fine against it. As we stated in Carter v. Lake Wales Hospital Association, 213 So. 2d 898 (Fla. 2d DCA 1968), even gross negligence, by itself, will not support punitive damages.

One final problem: The Folsoms and FPC apparently agreed that if FPC would

leave the distribution line and poles in place, the Folsoms would assume liability for its doing so. At trial the Folsoms stipulated that they would be responsible for compensatory damages levied against FPC for any continuing trespass during the pendency of the litigation. The Folsoms did not, however, assume liability for the initial trespass. As noted previously, the installation of the line and poles did not result in any damage to structures or crops. We feel it logical, therefore, to assume the $500 compensatory damages were levied against FPC for the continuing nature of the trespass rather than the initial trespass. This being the case, we view the stipulation as shifting liability for the $500 compensatory damages to the Folsoms.

Accordingly, the awards of compensatory and punitive damages against Florida Power Corporation are vacated and the trial court shall enter judgment in favor

of the Scudders and against the Folsoms for $500. In all other respects the trial court's judgment is affirmed.

Affirmed in part, reversed in part, and remanded for entry of a judgment consistent with this opinion.

BOARDMAN, C.J. and McNULTY, JC., Concur.

IN THE CIRCUIT COURT, IN
AND FOR LAKE COUNTY, FLORIDA

CASE NO. 74-67

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

v.

L. M. FOLSOM and PAULINE
FOLSOM, his wife,

Defendants.

AMENDED COMPLAINT

Plaintiffs, Gilbert D. Scudder and Irene J. Scudder, his wife, by and through their undersigned attorneys, sue the Defendants, L. M. Folsom and Pauline Folsom, his wife, and allege the following:

1. That Gilbert D. Scudder and Irene J. Scudder, his wife, are residents of Campbell, New York, and own property located in Lake County, Florida.

2. That the Defendants, L. M. Folsom and Pauline Folsom, his wife, are

residents of Lake County, Florida, and sui juris.

3. That this is an action for damages in excess of Two Thousand Five Hundred Dollars ($2,500.00) exclusive of interest and costs.

COUNT I

Plaintiffs reallege and reaffirm paragraphs 1 through 3 above, and further allege:

4. That this is an action in trespass and for an injunction to prevent future trespasses.

5. That the Plaintiffs are entitled to relief against the Defendants upon the following facts:

(a) The Plaintiffs are, and at all times herein material to this Amended Complaint were, the owners of the following described property: together with improvements situated thereon located in Lake County, Florida, to-wit:

The SW 1/4 of the NW 1/4 of Section 12, Township 23 South, Range 26 East, of Tallahassee Meridian; and

West 1/2 of the SW 1/4 of Section 12. Township 23 South, Range 26 East, of Tallahassee Meridian.

(b) During the period between March 1, 1973, and October 18, 1973, the Defendants, by and through their respective agents, servants and employees then and there acting within the scope of their employment and in the performance of their duties duly assigned to them by said Defendants, entered upon the above described property without the consent of the Plaintiffs and did damage said property by disturbing the grade and level thereon, depositing clay thereon, and constructing a permanent clay road across the Plaintiffs' property; and did on or about the 22nd day of October, 1973, cut, tear down and remove the fencing and fence posts placed along the southern and western boundary of the aforesaid property without the Plain-

tiffs' consent.

(c) That the Defendants have wrongfully used and continue to use without the Plaintiffs' consent or permission the Plaintiffs' land upon which Defendants constructed a permanent clay road across the Plaintiffs' property for ingress and egress from their property, both for private and for commercial purposes for Defendants' own personal benefit and profit.

(d) The Defendants did commit the described acts of entry on and damage to the described property unlawfully and willfully, without regard to the property rights of the Plaintiffs, and with full knowledge, actual and constructive, that they had no right to do so, and did continue the described acts of trespass and damage after demand to cease and desist and after being actually advised of the Plaintiffs' rights.

6. As a direct and proximate

cause of the above described willful and wrongful acts of the Defendants, the property has been physically damaged, and the most valuable portion of the tract, along the edge of the lake, has been severed from the remainder, thereby decreasing the value of the whole parcel and the ability to consummate a sale of the subject property at its previous market value has been rendered impossible, so that the Plaintiffs have suffered a loss as a result of their inability to utilize and/or sell the property in its damaged condition; the Plaintiffs have had to incur the expense of retaining the firm of Nichols & Tatich, P. A., to prosecute this action, and will incur the expense of putting said property back into its former condition.

WHEREFORE, the Plaintiffs demand compensatory and exemplary damages against the Defendants in excess of Two Thousand Five Hundred Dollars ($2,500.00), reason-

able attorneys' fees, the costs of this action, and that this Court issue its order enjoining the named Defendants from coming onto or crossing the property in question in the future, and Plaintiffs demand trial by jury of all issues so triable.

COUNT II

Plaintiffs reallege and reaffirm paragraphs 1 through 3 above and, in the alternative to Count I above, further allege:

7. That this is an action for ejectment from real property located in Lake County, Florida.

8. That the Plaintiffs own clear title to the property pursuant to the chain of title attached hereto as Exhibit A, which is superior to any claim of title of the Defendants.

9. That the Defendants are unlawfully occupying the real property of the

Plaintiffs, which is effectively denying Plaintiffs the full use, benefit and enjoyment of their property.

WHEREFORE, the Plaintiffs demand judgment for possession of the subject property, costs of this action, damages against the Defendants, and demand trial by jury of all issues so triable.

COUNT III

Plaintiffs reallege and reaffirm paragraphs 1 through 3 above and, in the alternative to Counts I and II above, further allege:

10. That this is an action for unlawful detainer of certain lands located in Lake County, Florida.

11. That the Defendants have unlawfully taken possession of a strip of land across the subject property and constructed a road thereon without the permission or consent of the Plaintiffs and have used, and continue to use, said road for

private and commercial purposes and for their personal benefit and profit.

12. That the Plaintiffs hold clear title to the property pursuant to the chain of title attached hereto as Exhibit A.

WHEREFORE, Plaintiffs demand judgment against the Defendants for recovery of the premises together with the costs of this action and damages against the Defendants, and demand trial by jury of all issues so triable.

COUNT IV

Plaintiffs reallege and reaffirm paragraphs 1 through 3 above and, in the alternative to Counts I, II and III above, further allege:

13. That this is an action for a mandatory injunction to remove a willful and continuing trespass.

14. That the Defendants, L. M. Folsom and Pauline Folsom, his wife, own

and possess certain premises in the vicinity of Plaintiffs' premises in Lake County, Florida, to-wit:

> The East 1/2 of the SE 1/4 of Section 11, Township 23 South, Range 26 East, Lake County, Florida.

15. That during the period between March 1, 1973, and October 18, 1973, the Defendant, by and through their respective agents, servants and employees acting within the scope of their employment and in the performance of their duties duly assigned to them by said Defendants, did without regard to the property rights of the Plaintiffs and with full knowledge, actual and constructive, that they had no right to do so, wilfully and intentionally enter upon the Plaintiffs' property and construct a permanent clay type of road from the Defendants' property across the Plaintiffs' property to connect with Clay Pit Road, a public thoroughfare, without the permission or con-

sent of the Plaintiffs; the Defendants and their agents have used, and continue to use to the present time, this road for private and commercial purposes, without the permission or consent of the Plaintiffs, for their personal benefit and profit.

16. That the Defendants were advised by a representative of the Plaintiffs prior to the installation of the aforesaid road, that they had no legal right to construct said road, but, notwithstanding said knowledge, they actively, willfully and maliciously disregarded said advice and secretly and without contacting Plaintiffs, went ahead and built said road; and further, after the Plaintiffs' attorney served notice upon the Defendants by letter, caused the Florida Power Corporation to install wooden utility poles adjacent to the aforesaid clay road and across the Plaintiffs' property.

17. That the construction and exist-

ence of this road and its continued use by the Defendants and their agents with no regard for the property rights of the Plaintiffs denies the Plaintiffs of the full use, benefit and enjoyment of their property and constitutes a nuisance and irreparable injury and damage to the Plaintiffs and their premises.

18. That the acts of the Defendants, L. M. Folsom and Pauline Folsom, his wife, indicate an entire wanton and reckless indifference and disregard for the property rights of others.

WHEREFORE, Plaintiffs pray that the Court issue its injunction ordering the Defendants to remove the road from Plaintiffs' property and to cease using same as a means of ingress and egress to their property, and that the Defendants be ordered to reimburse Plaintiffs for the costs of this suit and reasonable attorneys' fees incurred therein, and that the Court grant compensatory and

exemplary damages to the Plaintiffs and such other and further relief to the Plaintiffs as it deems proper, and Plaintiffs demand trial by jury of all issues so triable.

COUNT V

Plaintiffs reallege and reaffirm paragraphs 1 through 3 above and, in the alternative to Counts I, II, III and IV above, further allege:

19. That in the event the Court should find that a statutory way of necessity exists under Section 704.01(2), Florida Statutes, the Court hear evidence as to the most convenient, practical and equitable route for such a way of necessity over the land of the Plaintiffs and as to the amount to be paid to Plaintiffs for the taking of their property by such procedure including costs and Plaintiffs' attorneys' fees incurred herein.

WHEREFORE, in the event the Court

should decide that a statutory way of necessity should exist across the land of the Plaintiffs, Plaintiffs pray that the Court issue its decree establishing the most equitable, convenient and practical way of necessity across the land of the Plaintiffs, award compensation to the Plaintiffs for the taking of their land pursuant to Section 704.04, Florida Statutes, and that the Defendants be ordered to reimburse Plaintiffs for the costs of this suit and reasonable attorneys' fees incurred therein, and that the Court award such other and further relief to the Plaintiffs as it deems proper, and Plaintiffs demand trial by jury of all issues so triable.

I HEREBY CERTIFY that a true copy of the foregoing Amended Complaint has been furnished to John H. Rhodes, Jr., Esquire, 535 South Dillard Street, Winter Garden, Florida, and to George E. Hovis, Esquire, Post Office Drawer 848, Clermont,

Florida, by mail this 17th day of October, 1974.

/s/ Jack B. Nichols
Jack B. Nichols, Esquire
Nichols & Tatich, P. A.
Suite 1110, Hartford Bldg.
200 East Robinson Street
Orlando, Florida 32802

Attorneys for Plaintiffs

CHAIN OF TITLE

This exhibit is voluminous and irrelevant to the issues before this Court, and has therefore been omitted.

EXHIBIT A

October 29, 1973

John H. Rhodes, Jr.
Attorney at Law
535 South Dillard Street
Winter Garden, Florida

Please reply to Orlando address

Re: Scudder and Folsom

Dear John:

I have your letter of October 24, 1973, in which you briefly outlined your various telephone conversations concerning the dispute between our respective clients which occurred subsequent to your client's beginning to use our client's property for access to his property.

Generally, I would agree that your letter sets forth our verbal communications to the effect that neither party would be giving up any of his legal rights as a result of our client's allowing Folsom to use our client's property to gain access to his property for a few days until such time as Mr. Folsom can prepare a road for access to his property from another direction.

EXHIBIT B

By this present concession on our client's part we do not intend to waive the right to bring suit if it appears necessary to do so.

I am somewhat concerned with the last paragraph of your letter, inasmuch as it was not my understanding that your letter would be for the purpose of shaping the areas in which litigation should be tried. Since this was not discussed or agreed to, I am sure you did not intend this to be included in the letter.

Please advise me as soon as possible as to the progress your client is making in obtaining access to his property from some other direction. Your prompt attention to this matter is appreciated.

Very truly yours,

Jack B. Nichols

JBN/glc

cc:Mr. Gilbert D. Scudder

EXHIBIT B

IN THE CIRCUIT COURT OF
LAKE COUNTY, FLORIDA

CASE NO. 74-66

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation,

Defendant.

AMENDED COMPLAINT

Plaintiffs, Gilbert D. Scudder and Irene J. Scudder, his wife, by and through their undersigned attorneys, sue the Defendant, Florida Power Corporation, a Florida corporation, and allege the following:

1. That Gilbert D. Scudder and Irene J. Scudder, his wife, are residents of Campbell, New York, and own property in Lake County, Florida.

2. The Florida Power Corporation is a Florida corporation.

3. That this is an action for damages in excess of Two Thousand Five Hundred Dollars ($2,500.00) exclusive of interest and costs.

4. That the Plaintiffs are, and at all time herein material to this Complaint were, the owners and were entitled to possession of the following described property together with improvements thereon located in Lake County, Florida, to-wit:

> The SW 1/4 of the NW 1/4 of Section 12, Township 23 South, Range 23 East, of Tallahassee Meridian; and
>
> The West 1/2 of the SW 1/4 of Section 12, Township 23 South, Range 23 East, of Tallahassee Meridian.

5. That the Plaintiffs are entitled to relief against the Defendant upon the following counts:

COUNT I

Plaintiffs reaffirm, reallege, reiterate and readopt paragraphs 1 through 5 of this Amended Complaint and further

allege:

6. That this is an action in ejectment to recover real property in Lake County, Florida.

7. That Defendant has caused its utility poles to be placed upon the real property hereinbefore described and is therefore in possession of said real property to which Plaintiffs claim title as shown by the attached statement of Plaintiffs' chain of title.

8. That Defendant refuses to deliver possession of said property to Plaintiffs or pay them the profits thereof.

WHEREFORE, Plaintiffs demand judgment for possession of said property, costs of this action, and damages against Defendant with interest thereon.

COUNT II

Plaintiffs reallege, reaffirm, reiterate and readopt paragraphs 1 through 5 of this Amended Complaint and in the

alternative to Count I above, further allege:

9. That this is an action for trespass.

10. That on or about the 3rd day of November, 1973, the Defendant, by and through its respective agents, servants and employees then and there acting within the scope of their employment and in the performance of the duties duly assigned to them by said Defendant, did willfully and intentionally enter upon the Plaintiffs' property without the consent or permission of the Plaintiffs, and with no regard for their property rights, and further without color of title to any easement across said property and with no investigation thereof, and did install thereon wooden utility poles across Plaintiffs' property for the financial benefit and profit of the Defendant at the expense of, and with damage to, the Plaintiffs.

11. That the Defendants' installation and maintenance of the aforesaid utility poles upon the Plaintiffs' property denies the Plaintiffs the full use, benefit and enjoyment of their property and constitutes a trespass directly and proximately resulting in damages to the Plaintiffs and their premises.

12. That the Defendant has for many years been engaged in the activity of erecting utility poles and securing easements or authority for such activity, and therefore knew or should have known that rightful and lawful entry onto the property of another and the erection of utility poles thereon must be pursuant to proper legal authority or pursuant to authority granted by the owner of the property in question.

13. That notwithstanding said knowledge, Defendant, with willful and wanton disregard for the property rights of the Plaintiffs, and for the financial benefit

of the Defendant, failed to obtain, or to make any reasonable effort to obtain, authority from the Plaintiffs or their authorized representative to enter onto the property of the Plaintiffs or to place utility poles thereon; failed to secure, or make any reasonable effort to secure, an easement in the property of the Plaintiffs; failed to institute or make any reasonable effort to institute, proper eminent domain proceedings with respect to any portion of the property of the Plaintiffs; and furthermore, with willful, wanton and reckless disregard for the rights of others, including the Plaintiffs, failed to discover, or make any reasonable effort to discover, the owner of the property in question upon which Defendant entered and erected its utility poles.

14. That the acts of the Defendant indicate an entire, wanton and reckless disregard for the property rights of the

Plaintiffs.

15. As a direct and proximate result of the above described wanton, reckless and wrongful acts of the Defendant, the Plaintiffs' property has been physically damaged; the most valuable portion of the tract, that along the edge of the lake, has been severed from the remainder, thereby decreasing the value of the whole parcel, and the ability to consummate a sale of the Plaintiffs' property at its previous market value has been rendered impossible, so that the Plaintiffs have suffered a loss as a result of their inability to utilize and/or sell the property in its damaged condition for its full value before said trespass; the Plaintiffs have incurred other costs in this action.

WHEREFORE, Plaintiffs pray that the Court grant compensatory and exemplary damages to the Plaintiffs, and order that the Defendant reimburse Plaintiffs for

the costs of this suit; and that the Court grant such other and further relief to the Plaintiffs as it deems proper.

COUNT III

Plaintiffs reaffirm, reallege, reiterate and readopt paragraphs 1 through 5 of this Amended Complaint and in the alternative to Count I and Count II above, further allege:

16. That the Defendant has for many years been engaged in the activity of erecting utility poles and securing easements or authority for such activity, and therefore knew or should have known that rightfull and lawful entry onto the property of another and the erection of utility poles thereon must be pursuant to proper eminent domain proceedings or pursuant to authority granted by the owner of the property in question.

17. That notwithstanding said knowledge, Defendant, with willful and wanton

disregard for the property rights of the Plaintiffs, and for the financial benefit of the Defendant, failed to obtain, or to make any reasonable effort to obtain, authority from the Plaintiffs or their authorized representative to enter onto the property of the Plaintiffs or to place utility poles thereon; failed to secure, or make any reasonable effort to secure, an easement in the property of the Plaintiffs; failed to institute, or make any reasonable effort to institute, proper eminent domain proceedings with respect to any portion of the property of the Plaintiffs; and furthermore, with willful, wanton and reckless disregard for the rights of others, failed to discover, or make any reasonable effort to discover, the owner of the property in question upon which Defendant entered and erected its utility poles.

18. That on or about the 3rd day of November, 1973, the Defendant, by and

through its respective agents, servants and employees then and there acting within the scope of their employment and in the performance of the duties duly assigned to them by said Defendant, did willfully and intentionally enter upon the Plaintiff's property without the consent or permission of the Plaintiffs, and with no regard for their property rights, and further without color of title to any easement across said property and with no investigation thereof, and did install thereon wooden utility poles across Plaintiffs' property for the financial benefit and profit of the Defendants at the expense of, and with damage to, the Plaintiffs.

19. As a direct and proximate result of the above described wanton, reckless and wrongful acts of the Defendant, the Plaintiffs' property has been physically damaged, the most valuable portion of the tract, that along the edge of the

lake, has been severed from the remainder, thereby decreasing the value of the whole parcel, and the ability to consummate a sale of the Plaintiffs' property at its previous market value has been rendered impossible, so that the Plaintiffs have suffered a loss as a result of their inability to utilize and/or sell the property in its damaged condition; the Plaintiffs have had to incur the expense of retaining the law firm of Nichols & Tatich, P. A., to prosecute this action, and have incurred other costs in this action.

20. That the aforesaid wanton, reckless and wrongful acts of the Defendant has deprived the Plaintiffs of their property without just compensation in violation of the laws and Constitution of the United States and of the State of Florida.

WHEREFORE, the Plaintiffs demand that the Defendant be ordered to compensate

them for the property of which they have been deprived, for the decrease in the market value of the remainder of their property with interest theron, for the costs of this action, and for reasonable attorneys' fees.

/s/ Jack B. Nichols
Jack B. Nichols, Esquire
Nichols & Tatich, P. A.
Suite 1110 Hartford Bldg.
200 East Robinson Street
Orlando, Florida 32802
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Complaint has been furnished by mail to C. Brent McCaghren, Esquire, of Winderweedle, Haines, Ward & Woodman, P. A., Post Office Box 880, Winter Park, Florida 32789, this 245h day of July, 1974.

/s/ Jack B. Nichols, Esq.

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND FOR LAKE COUNTY FLORIDA

CASE NO. 74-67

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

L. M. FOLSOM and PAULINE FOLSOM, his wife,

Defendants.

ANSWER TO AMENDED COMPLAINT

Come now the Defendants, L. M. FOLSOM and PAULINE FOLSOM, his wife, by and through their undersigned attorney, and for Answer to the Amended Complaint filed by the Plaintiffs herein, state:

1. That they admit the allegations contained in paragraph numbered 1 of the Amended Complaint.

2. That they admit the allegations contained in paragraph numbered 2 of the Amended Complaint.

3. That they admit the allegations

contained in paragraph numbered 3 of the Amended Complaint.

As to Count I, they reallege and reallege and reaffirm their answers to paragraphs numbered 1 to 3, inclusive of the Amended Complaint.

4. That they admit the allegations contained in paragraph 4 of the Amended Complaint.

5.(a) That they admit that Plaintiffs are the owners of those portions of the tract of land described in paragraph 5a which were above the water level of Flat Lake as shown on the United States Government Survey of said lands. They are without knowledge of and uncertain of the ownership of those portions of the tract of land described in the paragraph 5a which were below the waters of Flat Lake according to the United States Government survey of said lands and therefore deny that the Plaintiffs are the owners of such portions of the described

tract of land.

5.(b) That they admit that between March 1, 1973, and October 18, 1973, they and their agents, servants and employees entered upon some portions of the property described in Count I of the Amended Complaint without the express consent of the Plaintiffs. They deny that they damaged said property. They deny that they did on or about the 22nd day of October, 1973, cut, tear down and remove the fencing and fence posts placed along the southern and western boundary of the said property without the Plaintiffs' consent; they deny that they constructed a permanent clay road across Plaintiff's property. They admit that they have used, and continue to use, an existing roadway across Plaintiff's property for ingress and egress to and from their property for private purposes. They deny that they use it for commercial purposes.

5.(c) That they deny the allegations

contained in paragraph 5d of the Amended Complaint.

5.(d) That they deny the allegations contained in paragraph 5d of the Amended Complaint.

6. That they deny the allegations contained in paragraph 6 of the Amended Complaint.

As to Count II, they reallege and reaffirm their answers to paragraphs numbered 1 to 3, inclusive of the Amended Complaint.

7. That they admit the allegations contained in paragraph 7 of the Amended Complaint.

8. That they deny the allegations contained in paragraph 8 of the Amended Complaint.

9. That they deny the allegations contained in paragraph 9 of the Amended Complaint.

As to Count III, they reallege and reaffirm their answers to paragraphs num-

bered 1 to 3, inclusive, of the Amended Complaint.

10. That they admit the allegations contained in paragraph 10 of the Amended Complaint.

11. That they admit they have taken possession of a strip of land across the property described in Count I of the Plaintiffs' Amended Complaint for ingress and egress to and from their property for private purposes. They deny the remaining allegations in paragraph numbered 11.

12. That they deny the allegations contained in paragraph numbered 12 of the Amended Complaint.

As to Count IV, they reallege and reaffirm their answers to paragraphs numbered 1 to 3, inclusive, of the Amended Complaint.

13. That they admit the allegations contained in paragraph 13 of the Amended Complaint.

14. That they admit the allegations

contained in paragraph 14 of the Amended Complaint.

15. That they deny the allegations contained in paragraph numbered 15, except that they admit they use a road across the property described in Count I of the Amended Complaint for ingress and egress to and from their property for private purposes.

16. That they deny the allegations contained in paragraph numbered 16; except they admit receipt of the letter referred to therein and an earlier letter from Attorney John Skolfield which advised them that the Plaintiffs objected to their ingress and egress over the property described in Count I of the Amended Complaint.

17. That they deny the allegations contained in paragraph numbered 17 of the Amended Complaint.

18. That they deny the allegations contained in paragraph numbered 18 of the

Amended Complaint.

As to Count V, they reallege and reaffirm their answers to paragraphs numbered 1 to 3, inclusive, of the Amended Complaint.

19. Paragraph numbered 19 of the Amended Complaint is contingent and does not contain allegations of fact.

As an affirmative defense, Defendants allege that their property, and the uses existing thereof, fit the definition of a statutory way of necessity in accordance with Section 704.02(2) Florida Statutes, under which circumstances the Defendants use of a strip of land over Plaintiffs' property for ingress and egress and for electric power and telephone lines is specifically declared not to be a trespass or subject to damages.

As a second affirmative defense, Defendants allege that they had and have a legal right to use the property of the Plaintiffs in the manner in which they

have used it by reason of a prescriptive right to an easement over said property.

COUNTERCLAIM

Come now the Counterclaimants, L. M. FOLSOM and PAULINE FOLSOM, his wife, by and through their undersigned attorneys, and for cause of action against the counter defendants, GILBERT D. SCUDDER and IRENE J. SCUDDER, his wife, allege and state:

Count I

1. That this count is an action to enjoin interference with an implied easement under common law rules and the provisions of Section 704.01(1), Florida Statutes.

2. The Counter Plaintiffs are the owners of, and reside upon a parcel of real property located in Lake County, Florida, more particularly described as follows:

> The East half of the Southeast quarter of Section 11, Township 23 South, Range 26 East.

3. The Counter Defendants are the owners of a parcel of real property located in Lake County, Florida, more particularly described as follows:

> The Southwest quarter of the Northwest quarter and the West one-half of the Southwest quarter of Section 12, Township 23 South, Range 26 East.

4. The South two-thirds of the Counter Defendants' western boundary line adjoins and is in common with the Counter Plaintiffs' eastern boundary line.

5. The easterly portion of the Counter Defendants' southern boundary is bordered by a public road known as Clay Pit Road, and also known as Phil Peters Road, running East to State Road No. 545. The fee title of Clay Pit Road is owned by Lake County, Florida, in those areas pertinent to this action. The westerly portion of the Counter Defendants' southern boundary is bordered by, and is in, the waters of a lake known as Flat Lake. The entire southern boundary of the

Counter Plaintiffs' propety is bounded by, and is in the waters of Flat Lake. The ownership of all parties to this cause to the southern portions of the above described tracts which lie in the said Flat Lake would be subject to whatever rights the State of Florida or the County of Lake may have in submerged lands. On the East, North and West the lands of the parties to this cause are bounded by lands owned by persons or corporations not party to this action which lands have been mostly developed into citrus groves.

6. The Counter Plaintiffs and the Counter Defendants deraign their title through separate chains from a common grantor, one E. E. Edge, who owned both parcels from August 27, 1906, to November 3, 1909, when he sold the parcel presently owned by Counter Defendants to C. M. Clayton, Counter Defendants; predecessors in title through meane conveyances. On March 31, 1914, he sold the North one-half

of the parcel presently owned by Counter Plaintiffs to Edge Realty Company, Counter Plaintiffs' predecessor in title through meane conveyances. A complete deraignment of Counter Plaintiffs' title is attached hereto made a part hereof by reference and marked Exhibit "A".

7. The only practical access to Counter Plaintiffs' property from a public road is over the property of the Counter Defendants from Clay Pit Road. The only other access to Counter Plaintiffs' property from a public road is over the intervening properties of strangers to the Counter Plaintiffs' title. Access to the Counter Plaintiffs' property by land from a public road is necessary to the use and enjoyment of it for the purposes for which Counter Plaintiffs are using it, that is: residential purposes and raising of livestock.

8. At the time Counter Defendants acquired title to their property, before

and since. there has existed visible roads or trails over the property owned by Counter Defendants serving as access to the Counter Plaintiffs' property and properties lying to the North and West owned by other persons and these roads and trails have been used continuously for the purpose of ingress and egress by Counter Plaintiffs' predecessors in title for a period of more than twenty years. Over the years the exact location of these roads and trails has been moved about to accommodate the development of the Counter Defendants' property. The road used by the Counter Plaintiffs and their predecessors in title over the past 20 years has followed the lake shore of Flat Lake within 30 to 40 feet of the lake, but the lake shore has changed from time to time through the forces of nature and through human instrumentality.

9. The Counter Defendants know, or should have known, that the counter Plain-

tiffs and their predecessors in title have used a strip of land following the shoreline of Flat Lake for ingress and egress to their property from the time Counter Defendants acquired title to their property until the present day.

10. On or about October 22, 1973, the Counter Defendants erected fencing along their southern and western boundary lines, thereby effectively blocking access to the Counter Plaintiffs' property over the property of the Counter Defendants. (The fencing has been removed, but only as a temporary measure for the Counter Plaintiffs' convenience while the issues and rights between the parties are settled by agreement or by this action and the removal was intended as a waiver of any of Counter Defendants' rights.)

11. The Counter Plaintiffs do not have an adequate remedy at law.

WHEREFORE the Counter Plaintiffs pray:

1. That the Court determine and decree that the Counter Plaintiffs have an easement and way of necessity over the following described property, to-wit:

> The Southeast quarter of the Northwest quarter, and the West one-half of the Southwest quarter of Section 12, Township 23 South, Range 26 East, Lake County, Floirda;

the dominant tenement being the following described property, to-wit:

> The East half of the Southwest quarter of Section 11, Township 23 South, Range 26 East, Lake Count, Florid.

2. That the Court determine and decree the location, width and permissible use of such easement and way of necessity.

3. That the Court permanently enjoin and restrain the Counter Defendants from obstructing or closing such easement and way of necessity.

4. That the Court award the Counter Plaintiffs judgment for their costs incurred in this action.

COUNT II

Alternatively the Counter Plaintiffs allege:

1. That this is an action to establish private prescriptive rights on a parcel of land located in Lake County, Florida.

2. The Counter Plaintiffs reallege, reaffirm, reiterate and readopt paragraphs 2 through 5, inclusive of Count I of this Counterclaim.

3. The Counter Plaintiffs acquired the ownership of, and went into full possession of, the property described in paragraph 2 of Count I of the Counterclaim on April 17, 1973, by virtue of a warranty deed from Chloe Brown, formerly Chloe Brandenburg, an unremarried widow, which is recorded in O.R. Book 503 at page 92 of the Public Records of Orange County, Florida. The said Chloe Brown, formerly Chloe Brandenburg, acquired the ownership of, and went into possession of, said pro-

perty by virtue of a warranty deed from Ausbin Brown (who soon thereafter married) dated April 24, 1952, and recorded May 3, 1952 in Deed Volume 324, page 531, of the Public Records of Lake County, Florida. The said Ausbin Brown acquired the ownership of, and went into possession of said property by virtue of a Warranty Deed from L. R. Briley and Pearl A. Briley, his wife, dated November 13, 1945, and recorded November 9, 1946, in Deed Volume 259, at page 27 of the Public Records of Orange County, Florida.

4. For a period of more than 20 years, the Counter Plaintiffs and their said predecessors in title have actually, continuously and uninterruptedly used a road or trail over the property of the Counter Defendants described in paragraph 3 of Count I of the Counterclaim for the purpose of ingress and egress from their property described in paragraph 2 of Count I of the Counterclaim to a public road.

The use by Counter Plaintiffs and their predecessors in title has been open notorious, visible and adverse under claim of right. This has been inconsistent with the use and enjoyment of the property owned by the Counter Defendants and their predecessors in title.

5. The use referred to in paragraph numbered 4 herein has not been a permissive use.

6. The said road or trail has been similarly used by other property owners in the area to the West and North of the Counter Plaintiffs' property and, in fact, the use extended across the Counter Plaintiffs' property.

7. The said road has traversed the property of the Counter Defendant on a path roughly parallel to the shoreline of Flat Lake and about 30 to 40 feet distant from said shoreline. Since the shoreline of Flat Lake has fluctuated over the years through natural causes and human instru-

mentality, the exact location of the road has varied accordingly.

8. The Counter Plaintiffs, and their predecessors in title since Ausbin Brown acquired title, have used their property for residential and for agricultural purposes, including the raising of citrus fruit and the raising of livestock. The neighboring properties during this period of time have been used exclusively for raising citrus fruit. The motor vehicles and equipment necessary for these uses have consistently used the said road across Counter Defendants' property to gain access to the public road and Flat Lake.

9. The Counter Plaintiffs reallege, reaffirm, reiterate and readopt paragraphs 10 and 11 of Count I of this Counter Claim.

WHEREFORE, the Counterclaimants pray:

1. That they be adjudged the owners of an easement of way by prescription over

the following described real property of the Counter Defendant, to-wit:

> "A 15 foot strip of land the centerline of which is 40 feet from and parallel to the shoreline of Flat Lake from the West line of the West one-half of the Southwest quarter of Section 12, Township 23 South, Range 26 East, Lake County, Florida, to the North line of the right of way of Clay Pit Road."

2. That the said easement be adjudged to be appurtenant to the following described real property of the Counter Plaintiffs, to-wit:

> "The East one-half of the Southeast quarter of Section 11, Township 23 South, Range 26 East, Lake County, Florida."

3. That the Court award the Counter Plaintiffs judgment for their costs incurred in this action.

Count III

Alternatively, the Counter Plaintiffs allege:

1. That this Count is an action to establish and acquire a statutory right of way necessity under the provisions of Section 704.01(2), Florida Statutes.

2. The Counter Plaintiffs reallege, reaffirm, reiterate and readopt paragraphs 2,3,4,5,7,8,10, and 11 of Count I of this Counter Claim.

3. The said properties of the Counter Plaintiff and the Counter Defendant lie outside the boundaries of any municipality.

4. The need of the Counter Plaintiff is to have a right of ingress and egress for motor vehicles and trucks, electric power and telephone lines.

5. The Counter Plaintiffs are willing and able to pay a reasonable sum of money for such an easement, provided they do not have a legal right to it as alternatively asserted in Count I and Count II of this Counterclaim.

WHEREFORE, the Counter Plaintiffs pray:

1. That the Court determine and decree that the Counter Plaintiffs have an easement and statutory way of neces-

sity for ingress and egress and for telephone and electric lines over the following described property, to-wit:

> "The Southeast quarter of the Northwest quarter and the West one-half of the Southeast quarter of Section 12, Township 23 South, Range 26 East, Lake County, Florida;"

the dominant tenement being the following described property, to-wit:

> "The East half of the Southeast quarter of Section 11, Township 23 South, Range 26 East, Lake County, Florida.

2. That the Court determine and decree the location, width and permissible use of such easement and statutory way of necessity.

3. That the Court determine the amount of compensation due the Counter Defendant for such easement.

4. That the Court permanently enjoin and restrain the Counter Defendant from obstructing or closing such easement and statutory way of necessity.

5. That the Court award the Coun-

ter Plaintiffs judgment for their costs ioncurred in this action.

John H. Rhodes, Jr.
535 South Dillard Street
Winter Garden, Florida

George E. Hovis
Post Office Drawer 848
Clermont, Florida

Attorneys for Defendant,
Counterclaimant

By: _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to JACK B. NICHOLS, Suite 1110 Hartford Bldg., Orlando, Florida and BRENT McCAGHREN, Post Office Box 880, Winter Park, Florida, by U.S. mail this 12th day of December, 1974.

/s/ John H. Rhodes, Jr.
John H. Rhodes, Jr.
Attorney at Law

IN THE CIRCUIT COURT, IN
AND FOR LAKE COUNTY, FLORIDA

CIVIL ACTION NO. 74-66

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

v.

L. M. FOLSOM and PAULINE
FOLSOM, his wife,

Defendants.

_____

DEFENDANT, FLORIDA POWER CORPORATION'S ANSWER TO SECOND AMENDED COMPLAINT

Defendant, FLORIDA POWER CORPORATION, by and through its undersigned attorneys, answers the Second Amended Complaint, and says:

1. Paragraph 1 is admitted.

2. Paragraph 2 is admitted.

3. Paragraph 3 is admitted.

4. Defendant is without knowledge as to whether Plaintiff is the owner of the described property, but Defendant admits that it entered onto a portion of

the described property and placed utility poles on said property.

5. As to Count I, Defendant realleges and reaffirms its answers to paragraphs 1 through 5 of the Second Amended Complaint.

6. Paragraph 6 of Count I is admitted.

7. Defendant admits that it placed its utility poles upon the real property hereinbefore described, but denies that it is in possession of said real property to which Plaintiffs claim title.

8. Defendant denies paragraphs 8 of the Second Amended Complaint in that it denies it is in possession of said real property.

As to Count II, Defendant realleges and reaffirms its answers to paragraphs numbered 1 through 5, inclusive, of the Second Amended Complaint.

9. Defendant admits that this is an action for trespass.

10. Defendant admits that on or about the 3rd day of November, 1973, the Defendant, by and through its respective agents, servants and employees, did install utility poles upon certain property described in the Complaint, but Defendant denies each and every remaining allegation contained in paragraph 10 of Plaintiff's Second Amended Complaint.

11. Paragraph 11 is denied.

12. Defendant admits that it has for many years engaged in the activity of erecting utility poles and securing easements or authority for such activity, but denies the remaining allegations of paragraph 12 of the Second Amended Complaint.

13. Paragraph 13 is denied.

14. Paragraph 14 is denied.

15. Paragraph 15 is denied.

As to Count III, Defendant realleges its answers to paragraphs 1 through 5 of the Second Amended Complaint.

16. Defendant admits that it has for many years been engaged in the activity of erecting utility poles and securing easements or authority for such activity, but denies the remainder of the allegations contained in paragraph 16 of the Second Amended Complaint.

17. Paragraph 17 is denied.

18. Defendant admits that on or about the 3rd day of November, 1973, the Defendant, by and through its respective agents, servants and employees, did install wooden utility poles across certain property described in the Second Amended Complaint, but denies all other allegations contained in paragraph 18 of the Second Amended Complaint.

19. Paragraph 19 is denied.

20. Paragraph 20 is denied.

AFFIRMATIVE DEFENSES

As affirmative defenses, Defendant says:

21. That it placed such utility

poles upon said property described in the Second Amended Complaint at the request, direction and for the benefit of Defendants, L. M. FOLSOM and PAULINE FOLSOM.

22. Defendant, FLORIDA POWER CORPORATION, placed said utility poles within an area which Defendants, L. M. FOLSOM and PAULINE FOLSOM, have a legal right to use by reason of a prescriptive right to an easement over said property.

23. Defendant, FLORIDA POWER CORPORATION, erected said utility poles over property which Defendants, L. M. FOLSOM and PAULINE FOLSOM, enjoy a statutory way of necessity, pursuant to Florida Statutes §704.02(2), therefore, Defendant, FLORIDA POWER CORPORATION'S, act of placing said poles is by statute not a trespass or an action subject to damages.

24. Defendant, FLORIDA POWER CORPORATION, entered onto said property and placed utility poles on said property with the consent of the Plaintiffs, GILBERT D.

SCUDDER and IRENE J. SCUDDER.

25. Defendant, FLORIDA POWER CORPORATION, placed utility poles onto said property for the sole purpose of providing utility service to Defendants, L. M. FOLSOM and PAULINE FOLSOM, and such placement of the utility poles was not intended to benefit, nor does it in fact benefit, any person or persons other than said Defendants, L. M. FOLSOM and PAULINE FOLSOM.

CROSSCLAIM

Defendant, FLORIDA POWER CORPORATION, by and through its undersigned attorneys, and pursuant to Florida Rule of Civil Procedure 1.170, brings this Crossclaim against Defendants, L. M. FOLSOM and PAULINE FOLSOM, his wife, and allege:

26. This Crossclaim arises out of the same transaction or occurrence that is the subject matter of the original action in this case.

27. Crossclaimant, FLORIDA POWER CORPORATION, erected the utility poles at the request and direction of Crossdefendants, L. M. FOLSOM and PAULINE FOLSOM.

28. Crossdefendants, L. M. FOLSOM and PAULINE FOLSOM, represented to Crossclaimant, FLORIDA POWER CORPORATION, that Crossdefendants had an easement over said property to install and erect utility poles.

29. Crossdefendants, L. M. FOLSOM and PAULINE FOLSOM, at no time indicated to Crossclaimant, FLORIDA POWER CORPORATION, that Crossdefendants might not have an easement or other right to have utility poles installed over said property.

30. Crossdefendants, L. M. FOLSOM and PAULINE FOLSOM, are or may be liable to the Crossclaimant, FLORIDA POWER CORPORATION, for all or part of the claim asserted by Plaintiffs, GILBERT D. SCUDDER and IRENE J. SCUDDER, in the action against the Crossclaimant, FLORIDA

POWER CORPORATION.

WHEREFORE, Crossclaimant, FLORIDA POWER CORPOATION, demands indemnification from Crossdefendants, L. M. FOLSOM and PAULINE FOLSOM, for any damages found to be owing from Crossclaimant, FLORIDA POWER CORPORATION, to the Plaintiffs, GILBERT D. SCUDDER and IRENE J. SCUDDER.

I HEREBY CERTIFY that copies of the above and foregoing have been furnished to JERRY H. JEFFERY, ESQUIRE, of NICHOLS & TATICH, P. A., Suite 1110, The Hartford Building, 200 East Robinson Street, Orlando, Florida, 32801, Attorneys for Plaintiffs, and to JOHN H. RHODES, JR., 535 South Dillard Street, Winter Garden, Florida, 32787, Attorney for Defendants, L. M. FOLSOM and PAULINE FOLSOM, by U.S. Mail this 26th day of March, 1975.

JAMES L. FLY, ESQUIRE
WINDERWEEDLE, HAINES, WARD & WOODMAN, P. A.
Post Office Box 880
Winter Park, Florida 32789
Attorneys for Defendant/Crossclaimant, FLORIDA POWER CORPORATION

IN THE CIRCUIT COURT OF
FIFTH JUDICIAL CIRCUIT
FOR LAKE COUNTY, FLORIDA

CASE NO. 74-66; 74-67

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation, and
L. M. FOLSOM and PAULINE
FOLSOM, his wife,

Defendants.

FINAL JUDGMENT

This cause came on for hearing before the Court for judgment upon all issues raised by the pleadings, the parties having waived trial by jury during the proceedings.

Plaintiffs, Gilbert D. Scudder and his wife, Irene J. Scudder (the latter being deceased at the time of the final hearing), sued Defendants, Florida Power Corporation and L. M. Folsom and wife, Pauline Folsom, in separate causes of

action which were consolidated for trial. Plaintiffs demanded judgment for ejectment of the defendants, compensatory and punitive damages for trespass and, in the alternative, as an affirmative defense to a counterclaim, damages for inverse condemnation resulting from the construction of a clay road and power line over plaintiffs' property.

In defense, defendants alleged as a counterclaim that the right of way over plaintiff's property (1) was established by a prescription, (2) constituted a common law right of way of necessity, or (3) was a statutory way of necessity.

The evidence in this case established the location of the various parcels of property and improvements as shown on the map attached and made a part of this judgment.

In April of 1973, the defendants Folsom entered into a contract to buy Parcel "B". They promptly proceeded to

construct a clay road over Parcel "A", plaintiffs' property, from their land to Phil peters Road (shown on the map between (1) and (2). About the same time the road was constructed, the Folsoms applied to Florida Power Corporation for electric service to their property. At the time of the application Florida Power maintained an electric distribution line approximately one mile east on Phil Peters Road serviced by its Winter Garden division, and lines to the northwest of the Folsom property (shown from points (6) to (6) on the map attached) serv[illegible]ed by its Clermont division.

Initially, attempts were made to secure the necessary right-of-way for service from the northwest. Consent from the affected property owners was not obtained and the application was referred to the Winter Garden division.[1]

When the initial application was made by the Folsoms, the field representa-

tive of Florida Power Corporation made a rough sketch of the design of the power line from Phil Peters Road locating the Defendants' property at the western terminus of the road. At that point the new line to be constructed would run north approximately 2000 feet and west approximately 1000 feet. This initial design was projected in subsequent designs made by the Engineering Department of Florida Power.[2] Easements were obtained from the Defendant Folsom upon his property, but not upon the plaintiffs' lands.

In the latter part of 1973 a work order was issued by Florida Power for the construction of the line according to the

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(1) Testimony revealed that a concerted effort to obtain a right of way from the northwest was not made by Florida Power and that such an easement might have been reasonably obtained.

(2) This was a mistake that could have been readily observed and corrected by an inspection of the property, viewing of aerial photographs and an examination of the public records of Lake County.

erroneous plan. When the construction crew arrived at the terminus of Phil Peters Road with Flat Lake they discovered the error in the engineering design and proceeded to alter the construction by placing three poles with lines traversing the shoreline of Flat Lake on the south side of the recently constructed clay road running through the plaintiffs' property. The evidence in this case was inconclusive as to the location of the first pole at the junction of Phil Peters Road with the south end of the clay road, but conclusive that the second and third poles were, in fact, located on the plaintiffs' property.

Plaintiffs, residents of the State of New York, upon being informed of the road and power line promptly filed this suit.

The evidence in this case further reveals that the defendant Folsom's predecessor in title, Ausbin Brown, had

lived on Parcel "B" from 1949 until his death in 1958. In 1952 he convened the title of this property to Chloe Brandenberg, whom he later married, and they constructed a home on the land which they occupied until his death in January of 1958. Mrs. Brown testified that from 1952 through 1958 she and her husband used the same route upon which the Folsoms constructed the clay road as a means of ingress and egress to her home. Others testified that during the period as early as 1948 up to the present time they had been using various routes over plaintiffs' property for agricultural vehicles in servicing the groves lying to the north and west of the Folsom property.

When Ausbin Brown died in 1958 his wife moved to Winter Garden and the Brown property remained unoccupied until its sale in 1973 to the Folsoms. For several years after Ausbin Brown's death Mrs. Brown permitted friends to use the home

as a composite and recreational area and they used a similar route of ingress and egress to the property over the plaintiffs' land. Some years later during the 1960's the Brown house was destroyed and the Brown property was not used for any purpose until improved by the Folsoms at the time of their contract to purchase in April, 1973.

Plaintiffs acquired title to Parcel "A" in 1957 and proceeded to develop an existing young citrus grove, which had been planted on said property, apparently without any knowledge of any adverse claims to a right of way over their property by Ausbin or Chloe Brown. Mr. Scudder testified that he knew of the house on the property but was unaware of any necessity or use of his land for ingress or egress to the Brown property. he permitted, as an accommodation to other grove owners in the area, ingress and egress over various routes of his

property solely for the harvesting and cultivation of citrus crops.

The claim of the defendants of an easement by prescription is not supported by the evidence, and the Court finds that no such estate has been established by the defendants Folsom or their predecessor in title.

Easement by prescription had its origin in the common law of England, the original theory being that the right claimed must have been enjoyed beyond the period of the memory of man. The evolution of this presumption of a grant resulted in the common law rule of 20 years of continuous and uninterrupted use which prevails in our state. Zetrouer v. Zetrouer, 103 So. 625 (Fla. 1925).

Because prescriptive rights inflict corresponding losses or forfeitures of the rights of other persons, they have not been favored in the law. Creation of the estate arises only by an adverse use

of the privilege with the knowledge of the person against whom it is claimed or by use so open, notorious, visible and uninterrupted that knowledge will be presumed and exercised under a valid claim of right adverse to the owner, and acquiesed in by him; and such adverse use must exist for a period equal, at least, to that described by the Statute of Limitations for acquiring title to land by adverse possession. J. C. Vereen & Sons v. Houser, 167 So. 45 (Fla. 1936).

Corresponding to these requirements, the Supreme Court of Florida in Vereen adopted these further considerations:

1. If the user not be exclusive, and not inconsistent with the rights of the owner of the land, its use and enjoyment, the presumption is that such user is permissive rather than adverse.

2. No easement can be acquired when the use is by express or

implied permission.

3. Always considered is whether the user is against the interest of the parties suffering it or injurious to him. There must be an invasion of the parties' right, for unless one loses something the other gains nothing.

4. The presumption of grant can never arise when all the circumstances are perfectly consistent with the non-existence of a grant.

5. To establish a right by prescription it is necessary to prove three things: (1) the continued and uninterrupted use or enjoyment of the rights for the full period of twenty years; (2) the identity of the thing enjoyed; (3) that the use or enjoyment was adverse, or under claim of right.

6. When the claimant enjoys an easement openly, notoriously, con-

tinuously and uninterruptedly in derogation of another's rights for the full period of twenty years, the use will be presumed to have been adverse so as to pass upon the servient estate the burden of rebutting the presumption.

7. The rule in paragraph 6 above does not apply where claimant's own testimony shows that the use was permissive in its inception.

8. When proof is not clear and positive of adverse possession and occupation of land for the full statutory period, no title by adverse possession can be adjudged.

The Florida Supreme Court recently spoke to the point of adverse use. In Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974) the Court stated that use of the land by the party claiming the easement must be exclusive and inconsistent with the rights of the owner to its use

and enjoyment, or it would be presumed that such use is permissive rather than adverse, and will never ripen into an easement.

Applying these considerations to the case sub judice based upon all evidence before the Court, defendant's claim of easement by prescription utterly fails.

The defendants' claim for a common law easement under Section 704.01(1), Florida Statutes, was founded upon evidence that in 1906 the north 40 acres of Parcel "B" and the south 80 acres of Parcel "A" was titled in a common owner, E. E. Edge. In 1909 Edge conveyed the north 40 acres of Parcel "B", and subsequently in 1914 and 1917 conveyed the south 80 acres of Parcel "A" in 40 acre lots. At no time was there a common owner of all Parcel "B" and the plaintiffs' property through which the common law easement was sought. Furthermore, there was no evidence that Phil Peters

Road existed in 1906 or even as late as 1920.

Common law easements have their origins in the law from an implied grant of ingress and egress originating from a common owner. The common law rule of an implied grant of a way of necessity is specifically recognized in Florida Statutes, Section 704.01(1), which provides that such an implied grant exists when a person is granted lands to which there is no accessible right-of-way except over the land of the grantor, provided there is unity of title from a common source other than the original grant from the State or the United States. See also Hunt v. Smith, 137 So. 2d 232 (Fla. App. 1962). The common law way of necessity contemplated a common source of title between the dominant and servient tenaments. Stein v. Darby, 126 So. 2d 313 (Fla. App. 1961). At no time was E. E. Edge the common owner of all of Parcel

"B" and the plaintiffs' property through which the common-law easement was sought.

Furthermore, the conveyances by E. E. Edge did not land-lock the Defendants Folsom. In Hanna v. Means, 319 So. 2d 61 (Fla. App. 1975) the Second District Court of Appeal discussed the requirement of "common source" as contemplated in Florida Statutes, Section 704.01(1):

> The "common source" which forms the basis for a common-law way of necessity is not one who originally may have owned all the involved lands; the "common source" within contemplation of the rule must be shown to be he who created the situation which ultimately resulted in the land-locked parcel.

In Reyes v. Perez, 284 So. 2d 493 (Fla. App. 1973) the Fourth District Court of Appeal ruled that "the common-law easement comes into being by implication at the very time the grantor conveys a parcel which is inaccessible except over such grantor's lands." In the case sub judice the defendants' contention that the test of common source is met in E. E. Edge is

untenable. Accordingly, the Court concludes that a common-law easement as provided for under Section 704.01(1), Florida Statutes, does not exist upon the plaintiffs' property.

The third contention by the defendants was that a statutory way of necessity existed over the clay road from the defendants Folsom property to Phil Peters Road along the edge of Flat Lake pursuant to Section 704.01(2).

The Court finds that the property of the Folsoms was outside any municipality, was used as a dwelling and for stock raising purposes and that the Folsom land was shut off by lands, fencing or other improvements so that no practicable route of egress or ingress was available to the nearest public or private road.

Based upon the evidence submitted as to the practicability of this route as opposed to any others, the Court determined that a statutory right of necessity

existed over the plaintiffs' land to the extent of 30 feet along the road right-of-way established and improved by the defendants Folsom.

The Court further concludes that the defendant Florida Power Corporation did at the time of its power line construction trespass upon the lands of the plaintiff, that the location of the power poles upon plaintiffs' land were not reasonably located in relation to the newly constructed road to be within the bounds of any contemplated statutory way of necessity, and that the right-of-way of the defendants Folsom for an easement for ingress and egress, electricity and telephone service over and upon the lands of the plaintiffs should be located within the 30-foot statutory way of necessity. The Court considers such 30-foot easement sufficient for the construction of the power line and guide wires within a 15 foot area and also the road right-of-way

which does not exceed 15 feet.

According to Florida Statutes, Section 704.01(2), the easement granted herein may be maintained for persons, vehicles, stock and electricity and telephone service upon the plaintiff's land. The use of said property does not constitute a trespass provided the easement is used only in an orderly and proper manner.

As the power distribution poles were placed well outside the 30-foot right-of-way and have no logical relationship to the clay road, the Court finds from the evidence that the Defendant Florida Power Corporation did not use said easement in an orderly and proper manner and that the Defendant Florida Power Corporation did in fact trespass upon the property of the plaintiff when it installed said poles and line and said trespass continued until the trial of this cause.

Furthermore, the Court finds from the evidence that the trespass committed

by the defendant Florida Power Corporation was wilful, intentional, and with reckless indifference to the property rights of the Plaintiffs. The evidence before this Court revealed that Florida Power Corporation followed a policy when installing distribution lines which gave little or no concern to the property rights of landowners. In implementing this policy, the Defendant, through the testimony of its engineer, admitted that the company was taking certain risks at the expense of property owners in placing its distribution lines and poles on property without first obtaining a survey or viewing the public maps prior to installing such lines. Nevertheless, the Defendant Florida Power Corporation elected to take its chances in pursuing this policy at the expense of property owners affected, such as the Plaintiffs.

The unrefuted evidence showed that Florida Power Corporation has secured

rights of way from property owners for the construction of its power lines for many years. It knew the proper procedure for checking the public records to determine the legal owners of the lands its proposed lines would affect. It knew that surveying the exact location of its lines and poles on the property affected eliminated the risk of error in constructing the distribution line. It recognized the need to make personal contact with the property owners affected by its plans prior to the installation of its lines and poles. The evidence demonstrated that it was the policy of Florida Power Corporation to do these things prior to installing transmission lines. But in the instant case the Defendant Florida Power Corporation did none of these things in installing those distribution lines to the Folsom property, and instead elected to install a mile of line and poles along Phil Peters Road by "eyeballing"

an imaginary line along the side of the road and further installing approximately one-quarter of a mile of line and poles upon the Plaintiffs' property when the physical layout of the road, lake and land clearly revealed the engineering sketch previously prepared by the Defendant Florida Power Corporation was in error. No single employee of Florida Power Corporation apparently would admit he had made a mistake and instead the cause of the error was blamed on the policy of Florida Power Corporation for installing distribution lines to provide power to its customers.

The evidence thus reveals a policy of the Defendant Florida Power Corporation that was so careless and unconcerned with the rights of property owners that it would proceed to establish a distribution line in the face of a series of facts that no right of way in fact existed for the placement of the distribution poles.

The policy followed by the Defendant Florida Power Corporation in this case greatly endangers the rights of property owners in this state and is clearly against the public interest. The Court recognizes that punitive damages are awarded for the purpose of penalizing a defendant who acted in gross disregard of the rights of the Plaintiff and to deter such future conduct. Richards Co., Inc. v. Harrison, 262 So. 2d 258 (Fla. App. 1972). Punitive damages are therefore proper in this case, as the Defendant Florida Power Corporation has wilfully abused the rights of the Plaintiffs. An award of punitive damages is also proper in the instant case to deter the Defendant from continuing its careless procedures. As the Defendant is a multi-million dollar corporation, only a large award could successfully punish the Defendant and deter its conduct in the future. However, this Court feels constrained by recent

appellate decisions to limit the amount of exemplary damages in relation to the actual damages suffered. Canty v. Wackenhut Corp., 311 So. 2d 808 (Fla. App. 1975); Lan-Chile Airlines, Inc. v. Rodriguez, 296 So. 2d 498 (Fla. App. 1974); Air Line Employees Association International v. Turner, 291 So. 2d 670 (Fla. App. 1974). As the evidence indicates Plaintiff's damages to their property as a result of the placement of the distribution poles by the Defendant was not significant, the Court is accordingly restrained in its award of exemplary damages to $25,000.00, although this Court is not necessarily convinced this amount of damages will deter the future conduct of the Defendant in following the aforementioned policy.

Based upon the foregoing facts and conclusions of the Court on the evidence submitted to the Court, it is

ORDERED and ADJUDGED as follows:

1. The defendants L. M. Folsom and

Pauline Folsom have a statutory way of necessity, exclusive of common law right, over and upon the lands of the plaintiff Scudder, not to exceed 30 feet in width, traversing the shore of Flat Lake from the east boundary of the Southeast quarter (SE¼) of Southeast quarter (SE¼) of Section 11, to the northerly right-of-way line of Phil Peters Road through and to the South boundary of the Southwest quarter (SE¼) and Southwest quarter (SW¼) of Section 12, all in Township 23 South, Range 26 East, the established location thereof being the north boundary of the existing clay surfaced road through plaintiffs' property approximately 1540 feet in length that area lying sough thereof for a distance of 30 feet perpendicular to said north line, subject to the location within said right-of-way of the pump shed owned by the plaintiff Scudder, such easement to be temporary and to exist so long as the same shall be

reasonably necessary for ingress and egress by persons, vehicles, stock and electricity and telephone service thereon; provided that such easement shall be determined to exist from date of payment of the sums hereafter provided in paragraph 2 to be paid by the defendant Folsom to plaintiff Scudder.

2. As just compensation for the use of said easement the plaintiff, Scudder, shall have and recover of and from the defendant Folsom the sum of $7,400.00, for which let execution issue.

3. That the plaintiff, Scudder, have and recover of and from the defendant Florida Power Corporation the sum of $500.00 in compensatory damages and the sum of $25,000.00 in punitive damages, for which let execution issue.

4. That the defendant Florida Power Corporation shall forthwith move its poles and lines upon the plaintiffs' property to within the area of the ease-

ment described above.

5. The Court reserves jurisdiction of the parties hereto and the subject matter hereof for the purpose of assessing costs and entering judgment thereon against the respective parties upon presentation of evidence of costs.

6. The cross-claim of defendant Florida Power Corporation for indemnity by the defendant Folsom is denied.

DONE and ORDERED in Chambers at Tavares, Lake County, Florida, this 14th day of April, 1976.

/s/ Wallace E. Sturgis, Jr.
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Final Judgment have been furnished to Jack B. Nichols, Attorney for Plaintiffs, P. O. Drawer 33, Orlando, Florida 32802; John H. Rhodes, Attorney for Defendants, 535 S. Dillard Street, Winter Garden, Florida 32787; George E.

Hovis, Esquire, P. O. Drawer 848, Clermont, Florida 32711; and C. Brent McCaghren, Attorney for Florida Power Corporation, P. O. Box 880, Winter Park, Florida 32789 by U. S. Mail this 14th day of April 1976.

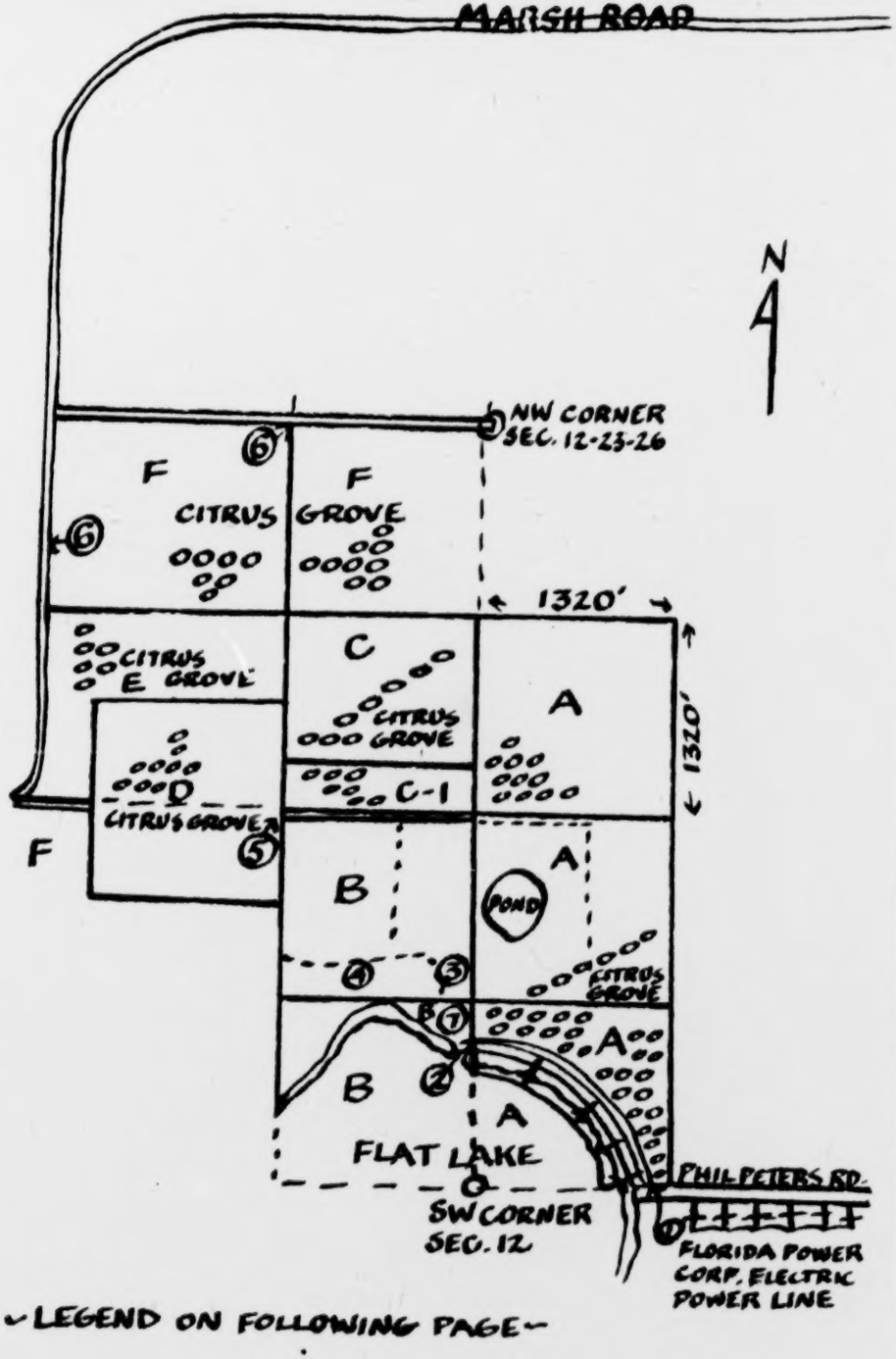
/s/ Mary Alexander
Secretary

STATE OF FLORIDA, COUNTY OF LAKE

I HEREBY CERTIFY, that the above and foregoing is a true copy of the original filed in this office,
JAMES C. WATKINS, Clerk,
Circuit Court

By /s/ Linda James Deputy Clerk

Dated 6-10-76



~LEGEND ON FOLLOWING PAGE~

Reference

Parcel

A- Gilbert Scudder Grove
W½ of SW¼ and SW¼ of NW¼
S12, T23S, R26E

B- L. M. Folsom Property
E½ of SE¼, S11, T23S, R26E

C- Cappleman Property (30 acres)
C-1- S 10 acres owned by Crawford
SE¼ of NE¼, T28S, R26E

D- Britt Grove

E- Britt-Tilden Grove

F- Southern Fruit Co. Properties

Points

1- Eastern terminus of 30 foot right-of-way of necessity
2- Western terminus of 30 foot right-of-way of necessity and west boundary of Scudder Grove property and east boundary of Folsom property
3- Folsom house
4- Folsom barn
5- West boundary of Folsom property and end of clay road
6- Location of power line on Southern Fruit Property
7- Location of Brown house in 1967.

-ure Mr. Nichols is purporting to represent.

THE COURT: Well, in all candor, the Court would say that the situation is so analogous to condemnation that I'm sure that - - or, I feel, that the statute violates the due processes of the plaintiff in this case to claim an allowance of attorney's fees. But that is not within, to me, the purview of judicial remedy, but legislative. Because the court has said in many, many decisions that you can claim attorney's fees only

where the statute provides. The statute makes no reference

to the compensation in such cases to include attorney's fees and costs of litigation; but it is damages for the party that is entitled, for use of such easement.
And it is limited to that extent for the damages to erase.

MR. HOVIS: Well, you can go a step further, Judge, and recognize that we're really involving two issues here. We're involving the issue of the use of the easement, and we're also involving the possible

issue of trespass, which they're trying to get in now. If there is in fact a trespass, the damages for the trespass are

we did raise the Constitutional guarantee and we want to preserve the fact that to the extent that this is applied in that fashion, it would be violating our Constitutional rights to compensation for the taking of our land without due process for our clients.

MR. HOVIS: I can recognize his argument, Judge, but I would like to have it clarified that we're not talking about trespass now.

THE COURT: Well, - -

MR. HOVIS: We started off the questioning on trespass.

our law consistent with what Constitutional guarantees require, the courts have done this, I think the Supreme Court of Florida has done it just recently, is the comparative negligence laws that I'm sure the Court is well aware of. So I would submit - -

THE COURT: But that was the Supreme Court, not a circuit judge.

MR. NICHOLS: Well, I submit to the Court that you - - -

THE COURT: And you have some judges that are crusaders and some that aren't. You happened to get hold of one that is a very strong believer in follow-

-ing the law as it is written, not making new in-roads on the law and declaring law as constitutional or unconstitutional.

MR. NICHOLS: Well, I'm merely submitting, Your Honor, that you - - - -

THE COURT: I will let you proffer it, but I can tell you that if for the record you want to proffer the amount of attorney's fees and other costs involved, to him personally, involved in this, if you want to pre-

serve some record, be my guest. But I will not

consider it in the judgment of the Court.

MR. NICHOLS: Thank you, Your Honor.

DIRECT EXAMINATION ON PROFFER:

MR. NICHOLS:

Q. For the proffer, sir, would you please tell us the costs and expenses to which you have been put as a result of the attempt to preserve your property from this use to which it has been put by Florida Power?

A. I have expended in excess of twenty thousand dollars, for surveys, and travel expenses. Not hotel or motel or food.

MR. HOVIS: Your Honor,

I hate to object on a proffer, but I think if you're going to get into it property, then he's going to have to testify in detail as to how he spent this money, for what purpose. And if he gets into any testimony on attorney's fees, there must be some testimony as to if the attorney's fees were proper and that the attorney's fees were reasonable. Now, you know, if this is going to go up, let's go ahead and get it in properly.

MR. NICHOLS: Well, you haven't given him a chance to answer yet; maybe he's

prepared to do that.

THE COURT: Go ahead.

WITNESS: Those funds were expended prior to the start of this court proceedings last Monday a week ago.

DIRECT ON PROFFER CONTINUED:

MR. NICHOLS:

Q. Sir, do you have specific records as to the exact amounts that you have expended in those matters, and if so, what are they?

A. The appraisal by Mr. Duckworth, seventeen hundred and fifty dollars. Fees to Skofield, Nichols & Tatich, and Nichols and Tatich later,

fourteen thousand five hundred and seventy-seven dollars and ninety-five cents. Attor-

ney's fees for Henry Scudder, nine hundred and sixty dollars. And I had air traffic, airplane tickets and travel beginning on September 29th, 1973, the first trip; March 20th, '74, was the second; July 22nd, 1975, was the third; which amounted to three thousand twenty-one dollars and eighty-three cents.

Q. And that does not include your travel for coming here for this trial?

A. That's right.

Q. Or your motel?

A. That's right.

Q. And does that include any damages for the loss of time for your time for devoting this period of time that has been necessary in this case, from your business?

A. No, nothing for my time being away.

Q. Are any other factors included in that twenty-thousand some odd dollars figure that you previously mentioned?

A. No, just what I said.

Q. Do the attorney's fees that you

mentioned include costs, including depositions and other travel expenses?

A. Right.

Q. And to that extent, did you from time to time receive itemized statements as to services which were being rendered as they were being rendered?

A. Yes.

Q. What was the exact figure, sir?

A. Twenty thousand three hundred and nine dollars and seventy-eight cents.

MR. NICHOLS: Do you want to cross, Mr. Hovis?

MR. HOVIS: Are you through with the proffer?

MR. NICHOLS: I'm through

with the proffer, yes.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
IN AND FOR THE SECOND DISTRICT
FRIDAY, OCTOBER 21, 1977

FLORIDA POWER CORPORATION,

Appellant,

v. CASE NO. 76-1005

GILBERT D. SCUDDER, L. M. FOLSOM and PAULINE FOLSOM, his wife,

Appellees.

L. M. FOLSOM and PAULINE FOLSOM, his wife,

Appellants,

v. CASE NO. 76-1036

GILBERT D. SCUDDER, et al.,

Appellees.

Counsel for appellees having filed in this cause a Petition for Rehearing and the same having been considered by the Court, it is

ORDERED that said Petition be and the same is hereby denied.

A TRUE COPY
TEST:

/s/ William A. Haddad

CLERK, DISTRICT COURT OF APPEAL
SECOND DISTRICT

cc: C. Brent McCaghren
Jack B. Nichols
John H. Rhodes, Jr.

IN THE CIRCUIT COURT OF
FIFTH JUDICIAL CIRCUIT
FOR LAKE COUNTY, FLORIDA

CASE NO. 74-66 & 74-67

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation, and
L. M. FOLSOM and
PAULINE FOLSOM, his wife,

Defendants.

FILED
JUL 21 9:54 AM '78
COUNTY CLERK AND ALSO
CLERK OF CIRCUIT COURT
LAKE COUNTY, TAVARES,
FLORIDA

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Gilbert D. Scudder, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Florida denying his Petition for Writ of Certiorari entered in this action on June 6, 1978. This appeal is taken pursuant to 28 U.S.C., Section 1257(2).

PROOF OF SERVICE

I, JACK B. NICHOLS, of Nichols & Tatich, P. A., attorneys for Gilbert D. Scudder, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 20th day of July, 1978, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

On FLORIDA POWER CORPORATION, L. M. FOLSOM and PAULINE FOLSOM, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To C. BRENT McCAGHREN, Esquire, Attorney for Florida Power Corporation, Post Office Box 880, Winter Park, Florida 32789;

To JOHN H. RHODES, JR., Esquire,

Attorney for L. M. Folsom and Pauline Folsom, 535 South Dillard Street, Winter Garden, Florida 32787.

/s/ Jack B. Nichols

JACK B. NICHOLS, Esq., of
NICHOLS & TATICH, P. A.
108 E. Hillcrest Street
Post Office Box 33
Orlando, Florida 32802
Telephone 305/841-8823
Attorneys for Plaintiff/
Appellant

IN THE CIRCUIT COURT IN
AND FOR LAKE COUNTY,
FLORIDA

CASE NO. 74-66

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation,

Defendant.

GILBERT D. SCUDDER and CASE NO. 74-77
IRENE J. SCUDDER, his wife,

vs. Plaintiffs,

L. M. FOLSOM and
PAULINE FOLSOM, his wife,

Defendants.

O R D E R

This cause came before the Court upon Defendant FLORIDA POWER CORPORATION's Motion to Compel Election of Remedies, and the Court having heard arguments of counsel, considered the

pleadings, and being otherwise fully advised in these premises, it is thereupon

ORDERED AND ADJUDGED that the said Defendant's Motion to Compel Plaintiffs to Elect Remedies is hereby denied. It is further

ORDERED AND ADJUDGED that the Plaintiffs' Motion to Strike that portion of the addendum clause of Count III of Defendant FOLSOM's Counter-claim is hereby granted upon consent of Defendant Folsom's counsel. It is further

ORDERED AND ADJUDGED that this cause shall come on for trial without jury on all equitable issues commencing at 9:30 a.m. o'clock on December 18, 1975, and continuing for two days, if necessary.

The parties are further directed to enter into a Pre-Trial Stipulation on or before December 1, 1975, regarding only those matters which are to be sub-

mitted to the Court for determination at the aforesaid non-jury trial. If the result of the non-jury trial of December 18, 1975, requires a subsequent jury trial on the issue of damages the Court will schedule a trial at the time of the entry of an Order on said issues.

DONE and ORDERED this 28th day of October, 1975, at Tavares, Lake County, Florida.

_____
CIRCUIT JUDGE

Copies by mail to:

Jack B. Nichols, Esquire, P.O. Box 33, Orlando, Fla. 32802

C. Brent McCaghren, Esquire, P.O. Box 880, Winter Park, Florida 32789

John H. Rhodes, Jr., Esquire, 535 South Dillars, Winter Garden, Fla. 32787

them you are a witness in the case and that you are prohibited from discussing it or having anyone discuss it in your presence.

If they persist, I ask that you report this matter immediately to the bailiff and appropriate action will be taken by the Court.

Your violation of the rule will and can result in your not being permitted to testify in this case.

All right. Both of you will remain out of the Courtroom. You will be called as a witness at the appropriate time.

All right, Mr. Rhodes, if you would care to proceed.

MR. RHODES: Well, I'd like to take a few minutes to explain how I feel that the issues that we have in this case will break down. As you know there has been some discussion of this and I'm aware that the Court, of course, is fully aware of the various causes of action involved.

We will proceed at this point with the Counts contained in our Counter Claim which involve assertion of a prescriptive right; the assertion of a common law easement; the assertion of a statutory way of necessity. The evidence on all of these subjects solicited from the

witnesses will be somewhat intermingled particularly as much as some of the same facts can get involved with each point.

We will submit to the Court, in considerable detail, the subject of prescriptive right would indicate the use of a particular area of Mr. Scudder's property for ingress and egress. We will not be submitting significant evidence of the use of this area for electrical power inasmuch as the electrical power did not come into this picture until on or shortly before, within a matter of days or weeks where the Plaintiff erected a fence which, according to our agreement fixed whatever rights existed at that time, in 1973.

THE COURT: I think your stipulation included the fact that some several months prior to that time, the poles were placed on the property.

MR. RHODES: I'm not exactly sure of the exact time, your Honor, but it was not sufficient to establish a use of that nature, therefore, it appears that the question of power will not come into prescriptive issue unless the law supports the idea that it follows with the ingress and egress use and I'm not sure that that is the law, but we'll get into that a little bit later, but only under those

circumstances.

In other words, under a legal basis rather than a factual basis should the issue be decided on a question of prescriptive rights.

If we are successful in maintaining our position for prescriptive right as to ingress and egress, it is my understanding and thinking that such ruling would, at that point, eliminate the necessity of a jury trial.

THE COURT: It depends upon, does it not, Mr. Rhodes, upon whether or not a prescriptive right for ingress and egress carries with it the same right as the power line.

MR. RHODES: That is what I was going to say, Your Honor. We may, however, be confronted with the necessity of a jury trial on the question

of a power line as distinguished from ingress and egress itself.

I was under the impression that the matter of common law easements would be primarily a legal determination, but Mr. Nichols and I just had a discussion which leaves some doubt on that subject and I guess that I, at this time, had better make no comment and see how that develops.

And then, of course, finally, the statutory way

of necessity in the event that there are no prescriptive rights and, if all of these are unsuccessful, it's been my understanding we would be in a jury trial with the question of the trespass for damages.

I simply wanted to state where I think I'm going before I start going, your Honor, and that's the extent of my opening.

MR. McCAGHREN: Your Honor, Florida Power, to some extent, is going with Mr. Rhodes, and I don't mean that as a pun.

What our position is, your Honor, we feel that the evidence presented will show that, for some twenty some years, that the route along

like Flat Lake crossing Mr. Scudder's property was used as means for ingress and egress to the property owners, that is to a Mr. and Mrs. Osborne Brown and to some of their successors and interests, and that route was also used by property owners lying to the north and to the west to get to and from their groves and that that use continued continuously from the late forties, early fifties on into the present time.

It's further our position that the evidence

IN THE CIRCUIT COURT,
IN AND FOR LAKE COUNTY.
FLORIDA

CASE NO. 74-66

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs -

FLORIDA POWER CORPORATION,
a Florida corporation,

Defendant.

GILBERT D. SCUDDER and CASE NO. 74-67
IRENE J. SCUDDER, his wife,

Plaintiff,

vs -

L. M. FOLSOM and
PAULINE FOLSOM, his wife,

Defendants.

MOTION TO COMPEL PLAINTIFFS TO ELECT REMEDIES

Defendant, Florida Power Corporation, by and through its undersigned attorneys,

moves this Court for an Order requiring Plaintiffs to elect their remedies and in support thereof would show:

1. Florida Power Corporation is Defendant in Case Number 74-66, which case has been consolidated with Case Number 74-67.

2. Plaintiffs, Gilbert D. Scudder and Irene J. Scudder, his wife, by their Second Amended Complaint, seek damages against Florida Power Corporation based upon a three (3) Count Complaint as follows:

(A) Count I is an action for judgment seeking possession of certain property allegedly wrongfully held by Florida Power Corporation, and seeking damages for such wrongful possession;

(b) Count II is an action for trespass seeking damages for wrongful installation of utilities poles on the properties owned by Plaintiffs;

(C) Count III is an action for compensatory damages based on a theory of inverse condemnation, purportedly arising out of Florida Power Corporation's installation of electrical distribution facilities upon property owned by Plaintiffs.

3. This cause is presently scheduled for Pre-Trial Conference to be held on January 15, 1976 at 10:45 a.m. in Tavares, Florida, at which time proposed jury instructions are to be submitted, all motions are to be concluded,

and counsel prepared to make disclosure of fact and stipulate as to evidence and facts.

4. Florida Power Corporation would show that Plaintiffs' Second Amended Complaint in alternative Counts presenting separate remedies, which are mutually exclusive.

WHEREFORE, Defendant, Florida Power Corporation, requests this Court to enter its Order requiring Plaintiffs to make an election of remedies, and require Plaintiffs to further file and serve such election of remedies within a reasonable time, sufficiently prior to the Pre-Trial Conference date so as to enable Defendant to adequately prepare for said Pre-Trial Conference.

C. Brent McCaghren, Esq.
WINDERWEEDLE, HAINES, WARD
& WOODMAN, P.A.
P.O. Box 880
Winter Park, Florida 32789
Attorneys for Defendant,
Florida Power Corporation

I HEREBY CERTIFY that a true copy hereof has been furnished by mail to: Jack B. Nichols, Esq., NICHOLS & TATICH, P.A., at Suite 1110, The Hartford Building 200 East Robinson Street, Orlando, Florida, 32801, Attorneys for Plaintiffs, and to John H. Rhodes, Jr., Esquire, 535 South Dillard Street, Winter Garden, Florida 32787, Attorney for Defendants Folsom, this 9th day of October, 1975.

Attorney

IN THE CIRCUIT COURT OF
FIFTH JUDICIAL CIRCUIT
FOR LAKE COUNTY, FLORIDA

CASE NO. 74-66

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation,

Defendant.

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

L.M. FOLSOM and
PAULINE FOLSOM, his wife,

Defendants.

MOTION TO QUASH

Come now the Plaintiffs, GILBERT D. SCUDDER and IRENE J. SCUDDER, by and through their undersigned attorneys, and move this Court to quash its Order for non-jury trial issued on the 28th

day of October, 1975, for the following reasons:

1. Plaintiffs' Second Amended Complaint in the cause sues for relief in both law and equity and seeks general, special and punitive damages against the Defendants and request trial by jury.

2. Plaintiffs are entitled to a trial by jury on all legal issues of fact raised by the pleadings and necessary to make a determination of the damages sustained by the Plaintiffs by reason of the acts of the respective Defendants to this cause. The law is clear in Florida that when legal and equitable issues are pleaded and a timely demand for jury trial has been properly made, the legal issues must be submitted to the jury even though its decision will conclude the equitable issues. See Westview Community Cemetery v.

Lewis, 293 So. 2d 373 (Fla. App. 4th 1974).

3. This Court's Order dated October 28, 1975, on its own motion has the effect of denying the Plaintiffs a trial by jury and their constitutional right of a trial by jury. See Westview Id. at 375.

4. The Court has orally indicated it will take testimony and evidence at the hearing it has set on December 18, 1975, to decide issues of fact. Such action on the part of the trial court when trial by jury has been requested by a party invades the province of the jury to decide questions of fact and is therefore a denial of due process of law to the Plaintiffs and a denial of Plaintiffs' constitutional right to a trial by jury as recognized by the law of this State since law and

equity actions have been merged.

WHEREFORE, Plaintiffs move this Court to quash its Order for non-jury trial.

I HEREBY CERTIFY that a true copy hereof has been furnished by delivery to C. Brent McCagrhen, Esquire, Winderweedle, Haines, Ward & Woodman, P.A., 250 Park Avenue, Winter Park, Florida 32789, Attorneys for Defendant Florida Power Corporation, and to John H. Rhodes, Jr., Esquire, 535 South Dillard Street, Winter Garden, Florida 32787, Attorney for Defendants Folsom, this 9th day of December, 1975.

IN THE CIRCUIT COURT OF
FIFTH JUDICIAL CIRCUIT
FOR LAKE COUNTY,
FLORIDA

CASE NO. 74-66

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation,

Defendant.

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

L. M. FOLSOM and
PAULINE FOLSOM, his wife,

Defendants.

ORDER NUNC PRO TUNC

This cause having come before the Court on the 12th day of December, 1975, on Plaintiffs' Motion to Quash, and the Court having heard argument

of counsel, having reviewed the file and being otherwise duly advised in the premises, and the Court file apparently reflecting no Order concerning the Court's ruling at the aforesaid hearing, it is therefore

ORDERED AND ADJUDGED nunc pro tunc that Plaintiffs' Motion to Quash is denied.

DONE AND ORDERED in Chambers at Tavares, Lake County, Florida, this 26th day of April, 1977.

Circuit Judge

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to: C. Brent McCaghren, Esq., P.O. Box 889, Winter Park, Florida 32790, John H. Rhodes, Esquire, 525 South Dillard Street, Winter Garden, Florida

and Jack B. Nichols, Esquire, P.O. Box 33, Orlando, Florida 32802, by mail this 20th day of April, 1977.

Secretary to Judge

STATUTORY WAY OF NECESSITY

COURT'S FINDING

WHEREUPON, FOLLOWING ARGUMENT BY COUNSEL ON DEFENDANT'S FOLSOM'S MOTION FOR STATUTORY WAY OF NECESSITY, THE FOLLOWING PROCEEDINGS WERE HAD ON FEBRUARY 19, 1976:

THE COURT'S FINDING:

THE COURT: Gentlemen, I've heard enough argument in this case and I know exactly what I'm going to do and I know where I'm going from here.

It is the ruling of the Court on the Defendant Cross-Claimant's claim involving a prescriptive easement, a common-law easement, and a statutory way of necessity, that the Defendants Folsom in this case have a statutory way of necessity as provided in 704.01(2),

this statutory way of necessity existing over and upon a road right-of-way along the shoreline of Flat Lake from the western terminus of Phil Peters, or, Clay Pit Road, to the west boundary of Section 12, Township 26 South, Range 23 East.

The Court establishes this route as and upon the location of the existing clay surface road approximately fifteen hundred and forty feet in length and thirty feet in width.

STATUTORY WAY OF NECESSITY

THE COURT'S FINDING

Now, based upon that ruling and the request of the parties to determine damages that are contemplated by 704.04, the matter of determination of the compensation to be paid as requested shall be heard by jury trial of the six jurors selected in panel "A", or the first panel, however we designated it, with the alternate juror number seven being the first selected in the panel "B" on the front row, Mr. Alfred T. Johnson.

I'm ready to proceed.

MR. NICHOLS: Your Honor, may we have a brief recess, about five minutes?

MR. McCAGHREN: Your Honor, before we recess if I might be

heard just a moment, and that is if I understood as the Court was determining the statutory way of necessity which my client has placed and has lying over that route, certain utility poles and lines which is included under 704.01(2), I didn't hear the Court make any mention as to that way of necessity being inclusive of that.

THE COURT: The statute so provides for that.

McCAGHREN: Yes, Your Honor,

STATUTORY WAY OF NECESSARY

THE COURT'S FINDING

THE COURT: The acquisition of a right-of-way of necessity carries with it the - - - under the statute, it's my understanding of the statute, it negates any trespass action that - - -

MR. McCAGHREN: Correct, Your Honor, and the easement acquired is the easement in the name of and on behalf of the landowner, it's not an easement that runs in the name of Florida Power. It's an easement that runs to the Defendant Folsom for his use to provide both ingress and egress, telephone and electrical power.

And so the easement granted, as the Court has just indicated, would be easement granted of a temporary nature to Mr. and Mrs. Folsom, which

would negate any compensatory position on behalf of my client.

THE COURT: It's my understanding that under 704.01(2) originally as enacted, the land-locked owner seeking a right-of-way of necessity could establish that right-of-way over the property by means of building a road, doing what was necessary and required. And it wasn't until the constitutionality of that was raised that 704.04 came into existence, when they said that in the event the landowner who is subjected to this, then comes in and complains, he is en-

STATUTORY WAY OF NECESSITY

COURT'S FINDING

on damages as far as Florida Power, punitive and compensatory.

MR. NICHOLS: Yes, sir, I understand.

THE COURT: The question of trespass and the question of damages for the taking.

MR. NICHOLS: Yes, sir, I understand that. What I was - - may we have a moment to confer.

THE COURT: Let's take a short recess.

BRIEF RECESS

WHEREUPON, AFTER A SHORT RECESS COURT RECONVENED AND THE FOLLOWING PROCEEDINGS WERE HAD:

THE COURT: I want to say

that out of the presence of the court reporter there has been a stipulation and agreement between the parties. Number one is

STATUTORY WAY OF NECESSITY

COURT'S FINDING

that based on the ruling of the Court as to the existence of a statutory way of necessity, exclusive of the common-law right as provided in 704.01(2), as to the existence of that, the parties are now willing to submit the matter of damages and the question of trespass, that is, damages for the taking of the right-of-way to be compensated to Gilbert D. Scudder by L. M. Folsom and Pauline Folsom, an award based upon those damages for the taking of the right-of-way, and the question of the trespass, both as to damages, compensatory and punitive, against Florida Power Corporation, to the sole determination by the Court. And that the jury in this case previously empaneled may forthwith be discharged.

Is that the stipulation and agreement and consent of the parties?

MR. RHODES: That expresses the idea of the Defendants Folsom, Your Honor.

MR. NICHOLS: Yes, Your Honor, we would be agreeable to presenting those two issues to the Court.

THE COURT: All right.

MR. McCAGHREN: Your Honor, I must apologize, I came in the middle of that stipulation, but

And then, we have Mr. Pugh and Mr. Scudder himself testifying, to their knowledge, "Of grove vehicles going around there. Hunters going around by the lake."

I would submit that since the late Forties, the shore front of Flat Lake across the southern portion of now the Scudder grove, that's always been used as a route for property owners lying to the west to get to and from their property.

Thank you, your Honor.

MR. NICHOLS: May it please the Court.

Your Honor, it's incredible to me that we should be in that position, as Plaintiffs in this suit

filed an action for trespass - "for tresspass" - that has admittedly occurred before Mr. Folsom - even on this property - that is an admitted, conceded fact, that Mr. Folsom put the road in on Mr. Scudder's property without legal right to do so.

No claim of right. And claim of right, your Honor, is the whole test of adverse possession. And, if he had no claim of right, when he put that road in, and then, he closed after the fact, you can't go in and clean up a tort, an intentional tort, by an after the fact action of buying the property.

IN THE CIRCUIT COURT OF
FIFTH JUDICIAL CIRCUIT
FOR LAKE COUNTY, FLORIDA

GILBERT D. SCUDDER and IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION, a Florida corporation,

Defendant.

CASE NO. 74-66

GILBERT D. SCUDDER and IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

L. M. FOLSOM and PAULINE FOLSOM, his wife,

Defendants.

CASE NO. 74-67

PRE-TRIAL STIPULATION

Pursuant to the Order of this Court dated October 28, 1975, counsel for the respective parties met on December 1, 1975 at 4:00 o'clock P. M. in the office of Plaintiffs' counsel. Plaintiffs'

counsel announced to Defense counsel his intentions to file a motion objecting to the sua sponte Order of the Court bifurcating the issues in this case into two evidentiary trials in which the Court has decided to determine questions of fact. The parties thereafter stipulated to the following items relative to the non-jury trial scheduled by the Court for December 18, 1975, commencing at 9:30 o'clock A. M.:

1. That the issues to be tried on December 18, 1975, by the Court without jury are:

a. Whether Plaintiffs are entitled to have an Order ejecting both defendants from the Plaintiffs' property more particularly described below.

b. Whether Plaintiffs are entitled to injunctive relief against Defendants Folsom for use of Plaintiffs' property in Lake County, Florida, more particularly described below.

c. Whether the actions of Defendant Florida Power Corporation constituted a taking of the Plaintiffs' property by inverse condemnation.

d. Upon Defendants Folsom's Counterclaim, whether said Defendants had certain rights to the use of the Plaintiffs' property upon one of the following legal theories:

(1) Rights of common law easement;

(2) Statutory way of necessity;

(3) Prescriptive easement.

e. That the Defendant Florida Power Corporation has filed an affirmative defense that it had a right to go upon Plaintiffs' property and do that which it has done on Plaintiffs' property under the rights of Defendants Folsom to do so and as agent for Defendants Folsom.

2. That Gilbert D. Scudder and the estate of Irene J. Scudder, deceased,

have been at all times material herein the owners of that certain tract of land described as:

> SW¼ of NW¼ of Sec. 12 Tp. 23 S. R. 26 E. and W½ of SW¼ of Sec. 12 Tp. 23 S. R. 26 E., Lake County, Florida, containing 120 acres more or less,

which is the subject of this litigation, from February 25, 1957, to the present date.

3. That L. M. Folsom and Pauline Folsom, his wife, have been the owners of that certain tract of land described as:

> E½ of SE¼ of Sec. 11 Tp. 23 S. R. 26 E., Lake County, Florida,

from April 17, 1973, to the present date, and that said property is adjacent to and lies immediately west of the south 80 acres of the Plaintiffs' aforesaid property.

4. That the aforementioned properties of the Plaintiffs and Defendants Folsom do not lie within the boundaries of any incorporated municipality.

5. That the Defendant Florida Power Corporation installed poles and electrical power lines upon the property described in paragraph 2, above, sometime after April, 1973, without obtaining the prior consent of Plaintiffs and without contacting Plaintiffs prior to said action being taken by the Defendants.

6. That Defendants Folsom caused clay to be placed upon Plaintiffs' property described in paragraph 2 above, and caused same to be graded as a road in or after April, 1973, without prior contact with the Plaintiffs and without obtaining Plaintiffs' consent, and that said Defendants have used said property for ingress and egress to the property described in paragraph 3, above, since the purchase of same by Defendants Folsom.

7. That counsel for the Plaintiffs and the Defendants have agreed to meet within the next two weeks and at least three (3) days prior to trial to review

their respective chains of title and copies of deeds upon which each party intends to rely in an attempt to reach a stipulation as to the most efficient manner of presenting the historical title evidence to the Court.

8. That Plaintiffs erected a fence upon their common property line with the Defendants Folsom on or about October 22, 1973.

9. Notwithstanding any stipulation to introduce title chains without certified documentary evidence, each party reserves the right to introduce certified copies of deeds in their respective cases.

10. The Plaintiffs announced their intent to call the following persons as witnesses:

Gilbert D. Scudder, Plaintiff
Hank Scudder, Plaintiff's son
L. M. Folsom, Defendant
Pauline Folsom, Defendant
Rod Rowe

Gary Holden
Raymond Crawford
Fred Davis
Frank Cappelman
Gene Cappelman
Chloe Brown
John H. Rhodes, Jr.
Charles Porvell
Glenn Thomas
Bill britt
Ann Sweeney
John Minor
William Hartzog
Edward Vick
Wayne Pugh
Representative from Southern Fruit Company
Edward J. Gurney
John Skolfield
Nixon Butt
David Hurd
Robert Tope
John Russell

Richard J. R. Parkinson

Any person named in any deposition or Answers to Interrogatories filed in this cause

Any person listed by any other party as a witness, or called as a witness by any other party in this cause

11. The Defendants announced their intentions to call the following persons as witnesses:

Frank Cappelman

Ward Britt

T. D. Tisdale

Chloe Brown

Charles Hawthorne

Ray Nicholson

C. A. "Blossum" Davis

Gary Holden

Glen Thomas

Rod Rowe

Plaintiff Gilbert D. Scudder

Defendants

Wayne Pugh

Doug Saddler

Joseph Caruso

Robert Freeman

Michael Donoghue

Donald E. Stephens

12. The parties agreed to provide opposing counsel and address and/or telephone numbers of those witnesses listed which opposing parties are unable to locate at least one week prior to trial.

13. It is also announced that representatives of the Lake County Road Department, Lake County Tax Assessor's Department, Clerk of the County Commission, and Clerk of the Circuit Court may be called by any party to authenticate documents or actions taken by their respective departments regarding facts relative to this case.

14. The Plaintiffs presented to the Defendants a series of color and black and white surface and aerial photo-

graphs and plat type drawings of the subject property and surrounding property which Plaintiffs indicated they intend to present at trial.

15. Defendant Folsom produced an aerial photograph dated February 24, 1947, and an aerial photograph dated March, 1972, and Plaintiffs made no stipulation as to the admissibility of said photographs.

16. Defendant Florida Power Corporation indicated its witnesses would be called from the witnesses listed by the Plaintiffs and Defendants Folsom, including a representative of the Tax Assessor's Office and Lake County Road Department, and a representative of Florida Power Corporation.

17. In conclusion, the parties agreed and stipulated to continue to communicate with each other regarding any subsequent stipulations or testimony of witnesses in order to present the facts

to the Court as efficiently as possible. It was agreed that the parties may continue to depose witnesses listed for discovery purposes.

/s/ C. Brent McCaghren
C. BRENT McCAGHNREN, ESQ., of
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/s/ John H. Rhodes, Jr.
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/s/ Jack B. Nichols
JACK B. NICHOLS, Esquire, of
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Post Office Drawer 33
Orlando, Florida 32802
Attorneys for Plaintiffs

L. M. FOLSOM, NICHOLS CROSS

A. Not since '73.

Q. '73 was when you purchased this property?

A. Right.

Q. What date did you purchase the property?

A. I believe it was in April of '73.

Q. April 17th?

A. I believe - I'm not sure of the exact date.

Q. The fact of the matter is, you had an employee of yours out there working on the property and building this road even before you closed on the property, didn't you?

A. I had men working, yes.

Q. And he was putting in this clay road before you closed on the property?

A. Yes, Sir.

Q. Did you ever check with Mr. Scudder, your neighbor, about building the road there?

A. No, I didn't. I didn't know somebody else owned that property.

L. M. FOLSOM, NICHOLS CROSS

Q. You didn't know somebody else owned it?

A. I thought this was access to my property.

Q. Did you ask anybody about this?

A. No, I didn't.

Q. Did you, prior to purchasing it, did you have any type of an opinion rendered by a private insurance company or anybody?

A. No.

Q. And the fact of the matter is, you have never spoken to Mrs. Sweeney about access to your property in that direction?

A. No, I haven't.

Q. You never spoke to Mr. Caruso of Southern Fruit?

A. No, Sir.

Q. And the fact of the matter is, you put that clay down there to stablize it so you wouldn't get stuck, didn't you?

A. I would say that was the reason I put the clay down there, yes.

MR. NICHOLS: Thank you, No

GLENN THOMAS, RHODES DIRECT

Q. Had you, in the previous survey, located the eastern bound-ary of Mr. Folsom's property?

A. Yes.

Q. When you performed this survey on the 14th of February, of this year, did you re-establish that boundary line?

A. Yes, that was re-established and the intersection point was established on the section line and the center line of the drive to be located.

Q. As a result of this survey in February, do you know what the distance is from the Clay Pit Road to the eastern boundary line of the Folsom property following the curvature of the area that appears to have been improved with clay?

A. Yes.

Q. What is it?

A. I might say that it could be variable because there was no research made as to the description of Clay Pit Road, but by the intersec-tion method which was used, that distance was fifteen hundred and forty feet.

Q. When you were survey-ing the property earlier for Mr. Folsom, did you do any survey

pointer, indicate where - - - do you recognize this Plaintiff's Exhibit A, for identification and, if you do, could you describe where you did your measuring?

A. I started right here (indicating). That's the Phil Peters Road right there (indicating) is it not?

Q. This is Phil Peters Road here (indicating).

A. All right, yeah, going down here. I started right there (indicating) where it comes off there, maybe seventy-five hundred feet from where that looked like you'd go straight across the lake and I measured on across to that gate and fence over there.

Q. Yes, Sir. Is it along

that route that you checked the depth of the clay?

A. Yeah, in three places. One, right close here (indicating). Another right close to the pump house and one down in that vicinity there (indicating) where the clay looked like it started getting shallow.

Q. And, Sir, would you please advise us what you saw in that connection?

A. Well, the first place, right up in here (indicating) I measured about twelve

inches of clay. Down in here (indicating) it was right at ten to twelve inches and over right up close to here (indicating) just before or about three or four hundred feet from the gate there, it was about six inches of clay.

Q. Did you measure the distance of that road?

A. I did.

Q. And what distance was that, sir?

MR. McCAGHREN: Your Honor, we would object to this unless the witness is qualifed in terms of - - - we have testimony of a surveyor who testified the means

to determine the length of the road and, if this witness is being offered in an expert capacity in terms of his ability to measure distance, I think we should have some qualification in that regard.

MR. NICHOLS: Your Honor, I

DAVID HURD, NICHOLS DIRECT

A. We would probably harrow about five times a year.

Q. Is it possible to harrow down to the lake with the road there?

A. Would you repeat that please?

Q. Would it be possible for a grove service to harrow down to the lake with the road in its existing place?

A. Not without going across the road, harrowing the road.

Q. Did Mr. Scudder request you to do anything to his property after you had reported to him - - or did you report to Mr. Scudder what you'd seen?

A. He, I guess he got a report from somebody else.

Q. Did you receive instructions as to anything you were to undertake to do at that point?

A. Mr. Scudder instructed me to place a fence across the property there at the beginning of the property and posted signs.

Q. And did you do that?

A. Yes.

Q. Do you recall when you did it?

A. No, Sir, I don't. I just recall doing it.

Q. And did you return to the property within sometime shortly thereafter and observe any change in that condition?

A. As well as I remember, it was within the next forty-eight hours, I returned to the property and notice that the fence had been cut and the pole that I had in the middle of the road had been pulled out and the signs were all laying over to one side.

Q. Thank you. Sir, is that an accurate representation of the appearance of the fence line that you observed upon returning to the property (photograph handed to the witness), after

you had installed the fence?

A. (Witnesses examining photograph) Yes. Uh-hum.

(There was a conference between Mr. Nichols and Mr. Hovis)

MR. NICHOLS: Are you going to wait until Mr. Russell comes back?

MR. HOVIS: Well, I'm going

L. M. FOLSOM

DIRECT- NICHOLS

A. Most of the time.

Q. Did Mr. Davis tell you what the problem was or what the delay was?

A. He just said that the engineers were working on it, they were trying to get a route.

Q. The engineers were working on it?

A. Evidentally before they're approved they have to go through them.

Q. Do you recall how many days went by, how much delay there was?

A. No, I don't.

Q. Do you know on what date you actually got power?

A. I believe it was in November.

Q. Did you observe them installing the power line?

A. I sure did, I'll never forget it.

Q. Why is that?

A. Well, I'd been living out there about six weeks prior to this, I had a trailer out there. And the day that they were putting the power in I was working on my fireplace and I looked out the window and I seen the power

trucks coming around the corner.

Q. And did you traverse the road between your property and Avalon, Clay Pit Road, there, daily, while they were installing this?

A. They installed it in one day. They were installing it down Clay Pit Road a couple days.

Q. Pardon me?

A. I said it took a couple days for them to come down Clay Pit Road.

Q. Did you observe them putting in the poles on the Scudder property?

A. The last one I seen put in was at the end of the road.

Q. When you say the end of the road, do you mean on the Scudder

side of your fence?

A. One of the two poles out there.

Q. That is to the east of your property line?

A. Yes.

Q. At that point did you know who owned the property to your east?

A. Yes, I did.

Q. And that was because Mr. Rowe had told you?

A. No, sir, it was because you had told me.

Q. I had told you?

A. Yes.

Q. So that was done after you had received notice from us?

A. Yes, it was.

Q. And did you advise Florida Power that you had received notice from us?

A. No, I didn't.

Q. You then knew at that point in time that there was some question about the property between you and Clay Pit Road, did you not?

A. Yes.

Q. Did you communicate

that fact to anybody connected with Florida Power?

A. No.

Q. Did you contact Mr. Scudder or did you advise my office that you had applied for power and that it would be coming over the Scudder property?

L. M. FOLSOM

A. No.

Q. Why not?

A. I had applied for the power back in April.

Q. I thought you said you had rushed them along, pushed them into action?

A. Well, yes, sir; I applied in April and it was November before I got it.

Q. It was October the 15th that you signed the easement, wasn't it, the document that I just showed you?

A. Yes, sir.

Q. At that time had you received the communication from my office, or Mr. Skofield, the letter that you made reference to?

A. I don't know, I don't remember when I signed. Actually, I don't

remember the date that's on that one, the one I just looked at.

Q. At the time you signed that easement did you know about Mr. Scudder owning the property to the east and objecting to your use of his property?

A. It's possible. If I knew the date that I received the letter from you and the date that I signed.

MARVIN LOGUE

DIRECT - NICHOLS

WHEREUPON, THE PLAINTIFFS CALLED TO THE STAND MARVIN EDWARD LOGUE, SWORN BY THE CLERK.

DIRECT EXAMINATION:

MR. NICHOLS:

Q. Would you please state your full name, please, sir?

A. Marvin Edward Logue.

Q. And what is your address?

A. 1506 Croton Drive, Maitland, Florida.

Q. Do you work for the Florida Power Corporation?

A. Yes, I do.

Q. How long have you been so employed?

A. I've been with Florida Power for fifteen years.

Q. And what is your

position or title in that company?

A. Well, my classification is clerk, but my duties is preparation of company easements for the

Eastern Division.

Q. Do you have a specific job assignment in this regard?

A. Yes, sir.

Q. And what is that?

A. That's to take the information that I receive from the engineers and prepare -- -- if easements are necessary, I prepare them.

Q. When you say "take the information from the engineers", where are you physically located?

A. I'm in Winter Park, in the engineering department.

Q. You're in the engineering department?

A. Yes, sir.

Q. So it's just a matter of collaborating or coordinating within one office building?

A. Yes, sir.

Q. And would you please tell us, sir, what your background is for the job that you're performing? What is your educational background?

be shown the witness has this knowledge. He said his job was preparation of the easements and not the engineering itself. I don't think that's proper predicate for the question of this particular witness.

DIRECT EXAMINATION CONTINUED:

MR. NICHOLS:

Q. In determining, sir, what easements are to be required, to what do you refer?

A. Whether they're going to be required?

Q. Yes.

A. If the proper information is not passed on to me by the

engineers, I sometimes have to come up here to the County Courthouse and make an investigation of the County records.

Q. All right. What is the information, when you say if the proper information is not communicated to you, what are you talking about?

A. Well, a legal description of the property and the location of the facility.

Q. Are you qualified to read legal descriptions?

A. I've had -- -- may I ask you what you mean by that?

Q. Well, when a legal description is presented to you, are you able to read it and to interpret it?

A. Yes, sir.

Q. What training have you had to do that?

A. Just on the job training. Over the years I've read legals and followed them out with scale

and pencil.

Q. You're not a lawyer, are you?

A. No, sir.

Q. You haven't been trained as a lawyer?

A. No, sir.

Q. So then you take the legal description that you get from the engineering department and determine whether or not that is sufficient?

A. I assume that it's sufficient, yes, sir.

Q. Does the engineering department make the decision on the legal, or do you?

A. Now, as to whether it is correct or not, I can't determine that, no, sir.

Q. Okay. As a matter of fact, in this process of determining and preparing the easements, your legal department is not involved, is it?

MR. McCAGHREN: Objection to the form of the ques-

tion, Your Honor, leading the witness.

MR. NICHOLS: I'll strike it.

MARVIN LOGUE

DIRECT - NICHOLS

DIRECT EXAMINATION

CONTINUED:

MR. NICHOLS:

Q. Is your legal department involved in the ordinary course of events in preparing the easements as you have stated you do?

A. No, sir.

Q. If you determine, then, from the information that is presented to you by the engineering department that the legal description is insufficient, what do you do?

A. I go back to the engineer. Well, in some cases I'll come up here and check the legal descriptions in the courthouse, either on a deed or on the tax records.

Q. You drive from Winter Park, if it's in Lake County, to the

Tavares courthouse?

A. Yes, sir.

Q. And you check the tax rolls?

A. Yes, sir. If I have a question about any easement.

Q. If you have a question about it.

A. Yes, sir.

MARVIN LOGUE

DIRECT - NICHOLS

Q. Is this solely within your judgment as to whether or not a question should be raised?

A. Well, apparently that's what my supervisors expect me to do.

Q. And when you get to the Lake County courthouse, if you determine that it's necessary, then what do you do?

A. Well, I just explained that. I go to the tax records and read the legal description clauses, or if something seems to be omitted in the legal description, I'll ask some of the people down there in the office to check it out for me. This is something that I've been doing for some time and the procedure for me is more or less standard.

Q. Okay. Do you also

check with the Road Department for permits to put lines along the road?

A. Yes, sir, that comes within my area of responsibility, too. I do not prepare the permit, I only process them.

Q. But you make the contact with the necessary County agencies for that purpose?

A. Yes, sir.

-ern approach to the Folsom property across the route where the lines are now situated?

A. I may have been asked by Mr. Harris to check the possibility, after the matter being brought to his attention.

Q. I'm talking about prior to that.

A. Prior to that time, no, sir.

Q. Do you know whether or not you have ever checked the public records of Lake County, Florida, as to the ownership of the property between Clay Pit Road terminus with Flat Lake to the Folsom property in the southeast quarter of the southeast quarter of Section 11?

MR. McCAGHREN: Objection, Your Honor, to the form of the question. It is also repetitious, he's asked it before. It's also vague and indefinite as to point in time.

THE COURT: It's my understanding that he testified he didn't go to the courthouse.

MR. McCAGHREN: Yes, sir, I just want to make sure that's understood.

DIRECT EXAMINATION

CONTINUED:

MR. NICHOLS:

Q. Did you check the records with regard to the ownership of Mr. Folsom's interests in the southeast quarter of the southeast quarter of Section 11, or any property in Section 12-23-26 Lake County?

A. When?

Q. Excuse me, at the

time that this work order was in process in your department?

A. As I explained, I don't recall coming to the courthouse on this request.

Q. Well, what reason, if any, do you have for not having done so?

A. Well, I was supplied with the legal description of the property.

Q. Who supplied that to you?

A. The district office. And the drawing which was provided me indicated that the road terminated at Mr. Folsom's property.

Q. Okay, when you say you were supplied, this map that you have in front of you here, -- --

A. I was supplied with this map.

Q. Well, you indicated a while ago you just walked down the hall and that you had seen this large engineering drawing after May 17, '74, and -- --

MR. McCAGHREN: Objection, Your Honor, the document itself is after the point in time.

THE COURT: Objection sustained. He couldn't have seen it while he was preparing the work order because it wasn't prepared at that time.

DIRECT EXAMINATION CONTINUED:

MR. NICHOLS:

Q. Isn't it a fact that you also relied upon information sent to you from the district office?

A. That's my practice, yes, sir.

Q. And in this instance did you make a special point of communicating with Mr. Fred Davis concerning the question of who owned the property over which this easement was

to pass?

MR. McCAGHREN: Objection,

Your Honor, unless it's more clearly defined what Mr. Nichols means by "special effort". I'm not sure I understand what he means by that.

MR. NICHOLS: I will delete the term "special effort".

DIRECT EXAMINATION CONTINUED:

MR. NICHOLS:

Q. Did you contact Mr. Davis with reference to the question of who owned the property over which the route was proposed?

A. My recollection was that we did have conversation about it, yes.

Q. And this was before

you prepared the easement?

A. Yes, sir, to my recollection it

was.

Q. And was it based upon that conversation that you decided not to go to the Lake County courthouse and check the records?

A. That, partially, and with this drawing. I called him, because this drawing didn't show a property line here, so I called to verify that it was going up to the east property line of the property.

Q. Did you have aerial photographs of Lake County and Flat Lake?

A. No, sir.

Q. Where are those photographs located?

A. Aerial photographs?

Q. Yes.

A. Here at the courthouse.

Q. In Lake County?

A. Yes, sir.

Q. Did you come to Lake County - -

A. They're the only ones that I have knowledge of. Now, we may have an old ancient plat book, Lake County plat book in our office, but I certainly wouldn't want

to rely on it.

Q. Did you go to that and look at that?

A. No, sir.

Q. Did you come to Lake County and look at the aerial photographs of the Sections?

A. No, I didn't feel like it was necessary. I felt that I had the information that I needed to prepare this easement.

Q. Flat Lake was on this drawing that you had, wasn't it?

A. Yes, sir, it is on there.

Q. And by the location of Flat Lake, would it have been on the tax assessor's records in relation to the property that Mr. Folsom owned?

A. It probably would have.

Q. And Mr. Scudder's property would have been located on there, too, wouldn't it?

A. It probably would, yes, sir.

Q. And by looking at that map you would have been able to tell whether Flat Lake and Folsom's property was in Section 11 or Section 12, wouldn't you?

HOWARD GILKES

DIRECT- NICHOLS

DIRECT EXAMINATION

CONTINUED:

MR. NICHOLS:

Q. Are there any legal personnel, lawyers, trained attorneys, who review any of this work at this point?

A. I'm not sure what the line of relationship is between Marvin Logue and our legal department and our easement department in St. Petersburg.

Q. Marvin Logue, then, would be the best advise on that?

A. Well, his immediate supervisor is right there, which is Jan Hendricks. But he has a direct responsibility to St. Petersburg; he sends them information and they send him

information. I don't know what his connection is there, though.

Q. As an engineer and doing the type of work you do, is it necessary for you to know some of the rudiments of surveying?

A. We do not do surveying.

Q. Well, how do you know, when you are out in the field and you're going to put a line down a road, how do you know where the center line of that road is, or that

HOWARD GILKES

DIRECT - NICHOLS

Section line, or whatever, to know where to place your poles?

A. Well, that's a good question, and a good example was this drawing I just got through doing right here. We had a County road that we had to build a mile line down, and if you've been on that road, as I know you have, it's not a straight road. And if you look on a map, like this map right here, it looks pretty straight. But you go out there in the field and it's not straight. Yet, you've got to ---- I'm talking about engineers in general, he's got to build a line and he knows it's got to be straight. And to follow along the south side of that road with line with the line, it involves anchors, plus you know it's in the wrong place because technically, legally, that road is

straight on the map.

So, what you do is, you use your eye and you look for the straight line. And just exactly where you place that pole with regard to the middle of a dirt road that meanders, there's no pretense of precision involved in exactly where that pole should be when you say, "Well, it ought to be one foot off the road right-of-way, inside the road right-of-way". You don't go by that.

Obviously that's where we try to get it, one foot inside the road right-of-way. But how could

we eye-ball something like that and do it everytime? It's practically impossible.

Q. Well, doesn't Florida Power use surveys"

A. Not in distribution lines. They do in transformers.

Q. Never in distribution?

A. Not to my knowledge. Because they haven't got any surveyors.

Q. Do you obtain permits from the County as to where you're going to put a line, and that kind of thing?

MR. McCAGHREN: Objection, Your Honor, unless it's put in reference to a point in time.

DIRECT EXAMINATION

CONTINUED:

MR. NICHOLS:

Q. Were you at that point doing that, obtaining permits back in 1973?

A. Did we obtain permits back in '73?

Q. Yes, sir. For distribution lines?

A. Did we obtain them for this job?

Q. Yes, sir.

A. No, and it's not unusual that we didn't. Because we already had a line on that road and it was an extension of an existing line. And back in those days there was a rule

that you could extend down an existing road from an existing line and it did not require a County Road permit. But today it is different.

Q. Okay, sir, then the information as I understand it is, this line from the south side of Clay Pit Road eye-balled to here?

A. That's right. Well, now, there was a fence down here. You need to go by whatever you find in the field. And there was a fence. As a matter of fact,

when we staked this line we started from this end, because this was where the fence was. Now, there's no guarantee that the fence was on the road right-of-way. But I've got to go on the best information I've got, and that fence was the best thing that I had. So I started down from the point of that fence. I started just being inside that fence, just north of that fence as far as the fence went until it ran out. Which wasn't very far.

Q. But you didn't know -

A. And from there on it was eye-ball.

Q. But you really didn't know whether you were in the road right-of way or not at this point?

A. No, there was no insurance, but it wasn't any big problem because if it wasn't and somebody told us that we weren't, we'd be glad to move into it. It's not that big a deal. In other words, our alternative is to have a stand-by survey crew at a big expense, or just to move a few poles whenever we have to if somebody requests us to over an easement.

Q. Was this just a minor job, to run a line a mile or so down the road and then, what is it, back how many miles or half a mile, or whatever it was?

A. It wasn't more than half a mile. The whole line was little over a mile and a half long. That's not a big deal.

Q. You didn't feel that a survey was necessary?

A. Definitely not. You'd be laughed at if you did have an actual survey by the rest of the crew.

Q. You would have been laughed at?

A. Well, this was unheard of. We just handled our field work.

Q. Well, isn't it important to you to know where the property lines are?

MR. McCAGHREN: Your Honor, I'll object to

this since he's trying through Mr. Gilkes to impeach the testimony perhaps of Mr. Crimmins whom he called from Sumter Electric who also

MR. NICHOLS: No, sir. I'm not arguing. I'm trying to learn the facts as to whether not there might be cases where a survey might be indicated, Your Honor, and I think the Court can draw its own conclusions from there.

DIRECT EXAMINATION

CONTINUED:

MR. NICHOLS:

Q. How would you, sir, determine where somebody's property line is in the field without a survey?

A. Well, do you want to go back to this particular case again, like where we determined the property

line was along this mile long line?

Q. Well, using this case as an example, without a survey how do you know where the property line is?

Q. Just strictly the naked eye, or unless you wear glasses, then just glasses?

A. Yes.

Q. Okay. With regard to the property line of any property owners to the north of the road and between the road, as Clay Pit Road is circumscribed as a straight line across the lake, how did you know where the property line was on the north side of the road?

A. You mean Mr. Folsom's property

A. Well, the best line there was the fence.

Q. Where, now, did you take off up the road, off the road right-of-way of Clay Pit Road, as you assumed it to be by this fence?

A. Well, sometimes you find right-of-way markers. And if I recall, there may have been some somewhere out in here, markers, which when you find those you say, "Praise the Lord", cause you know you something to go by.

Q. Does your crew have these transoms or whatever they call them, that surveyors or engineers use to get a bead on something?

A. No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

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Appellant,

vs.

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a Florida corporation,
L. M. FOLSOM and PAULINE
FOLSOM, his wife,

Appellees.

On Appeal from the Supreme Court of the

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Motion to Dismiss Appeal

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I N D E X

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MOTION OF APPELLEE, FLORIDA POWER CORPORATION, TO DISMISS APPEAL

Appellee, FLORIDA POWER CORPORATION, moves that the appeal herein taken be dismissed on the ground that said appeal does not present a substantial federal question and the judgment of the lower court rests on an adequate non-federal basis.

This is an appeal asserting that Florida Statutes, §§704.01(2) and 704.04 are repugnant to the Constitution of the United States by denying Appellant SCUDDER equal protection of the laws and due process of law and further denying him a right to trial by jury.

Florida Statute §704.01(2) creates a statutory way of necessity permitting a hemmed-in owner of property to use and maintain an easement over lands lying between his hemmed-in property and the nearest public or private road. Florida Statute §704.04 creates a judicial remedy to determine if such condition exists, and if so, the location, extent and type of easement. This section further provides for a determination of the compensation to be paid for the use of such easement and permits the amount of compensation to be determined by a jury trial.

In the proceedings brought in the state court in Florida, a statutory way of necessity was granted across property owned by Appellant SCUDDER to permit ingress and egress, electricity and telephone service to residential property owned by the Appellees FOLSOM. Compensatory damages for the easement were awarded in the amount of $7,400.00, together with an additional sum of $500.00 compensatory damages for an alleged trespass by FLORIDA POWER CORPORATION.

Appellant SCUDDER argues that the failure of the court to award him attorney's fees as "just compensation" violated his rights to due process of law and equal protection of the laws.

THERE IS NO BASIS TO APPELLANT'S CLAIM OF DUE PROCESS VIOLATION

Appellant's claim of Fourteenth Amendment due process violation is predicated upon what is claimed to be a taking

of his property for the statutory way of necessity without just compensation. The trial court specifically awarded the sum of $7,400.00 as compensation for the easement across Appellant's land but declined to award any attorney's fees as damages to Appellant. Appellant argues that the award of $7,400.00 without an additional award taxing attorney's fees for the services of his attorneys, results in a taking of his property without just compensation.

Federal courts have consistently refused to award property owners any amount to indemnify them for attorney's fees and other expenses incurred in the litigation because of the absence of statutory authority. Dohaney v. Rogers, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930); United States v. 2,353.28 Acres of Land, Etc., State of Florida, 414 F.2d 965 (5th Cir.1969); United States v. Gila River Pima-Maricopa Indian Community, 391 F.2d 53 (9th Cir.1968).

The right to recover attorney's fee from one's opponent in litigation as a part of costs did not exist at common law. 20 Am Jur 2d, Costs §72. The term "costs" or "expenses" as used in the statute is not understood ordinarily to include attorney's fees. Id. The State of Florida does not permit recovery to the prevailing party for attorney's fees in the absence of a contractual or statutory provision. Phoenix Indemnity Co. v. Union Finance Co., 54 So.2d 188 (Fla. 1951); Joseph v. Houdaille-Duval-Wright Co., 213 So.2d 3 (Fla. 3d DCA 1968). Constitutional requirements of just compensation for the taking of land by eminent domain do not include attorney's fees. United States v. 4.18 Acres of Land, Etc., 542 F.2d 786 (9th Cir.1976).

In Florida, eminent domain proceedings brought by the State of Florida or its political subdivisions are governed by

Chapter 73, Florida Statutes. In particular, Florida Statutes §73.091 provides that the condemning authority shall pay all reasonable costs including a reasonable attorney's fee to be assessed by the Court. It is important to note that in Florida, attorney's fees are awarded to property owners in the case of condemnation action by public authorities, but only due to the existence of specific statutory authority.

In the recent case of Estate of Hampton v. Fairchild-Florida Construction Co., 341 So.2d 759 (Fla. 1977), the Supreme Court of Florida specifically reviewed the question whether attorney's fees were properly awardable in a proceeding to establish a statutory way of necessity pursuant to §704.01(2), Florida Statutes (1975). The court noted that generally attorney's fees are not recoverable unless a statute or contract specifically authorizes their recovery, or unless equity allows attorney's

fees from a fund or estate which has been benefited by the rendering of legal services. Id. at 761. The court concluded that proceedings to establish a statutory way of necessity did not stand on the same footing as condemnation actions by the state of Florida in its sovereign capacity and determined that there was no basis for the award of attorney's fees in actions brought under §704.01(2). See also Tomten v. Thomas, 125 Mont. 159, 232 P.2d 723 (1951) in which the court denied attorney's fees in a proceeding to establish a statutory way of necessity.

The Fourteenth Amendment to the United States Constitution does not require an award of attorney's fees in the establishment of a statutory way of necessity between private owners of adjacent land. No Florida statute requires the payment of attorney's fees in an action to establish a statutory way of necessity. The decisions of the

courts in Florida denying attorney's fees in such cases are properly founded on an adequate non-federal basis.

FLORIDA STATUTE §§704.01(2) AND 704.04 ARE RATIONALLY RELATED TO A LEGITIMATE STATE END AND THE MEANS EMPLOYED ARE RATIONALLY RELATED TO THE PURSUIT OF THAT END

The controlling principles with reference to permissable classification by state legislatures with respect to claims of denial of the equal protection of the laws in violation of the Fourteenth Amendment are too well-settled to require elaboration. In McDonald v. Board of Election, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969), this court said:

> "Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state

end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. See McGowan v. Maryland, 366 U.S. 420 (1961); Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552 (1947; Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911). With this much discretion, a legislature traditionally has been allowed to take reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," Williamsson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. See Ozan Lumber Co. v. Union County National Bank, 207 U.S. 251 (1907)" (p. 808-809)

This Court has further said:

"The equality at which "the equal protection" clause aims is not a disembodied equality. The Fourteenth Amendment enjoins "the equal protection of the laws," and laws are not abstract propositions. They do

not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they are the same." Tigner v. Texas, 310 U.S. 141, 147, 60 S.Ct. 879, 84 L.Ed. 1724 (1940).

"Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Capital Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some economic or social philosophy. ... We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Ferguson v. Skrupa, 372 U.S. 726, 729, 730, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963).

Florida Statute §§704.01(2) and 704.04 provide a judicial remedy for a person whose lands are shut-off or hemmed-in to acquire a statutory way of necessity across his adjoining neighbor's land to a public or private road by means of the nearest practical route. Compensation for the use of

the easement is to be awarded either by the court, or if demanded by either party, by a jury trial. Similar statutes have been passed in many states providing such a procedure by which an individual may have the property of another condemned for the purpose of making a necessary private road or a way of necessity to his property. See 29A C.J.S., Eminent Domain §34, P. 275; Ruddock v. Bloedel Donovan Lumber Mills, 28 F.2d 684 (9th Cir.1928); Gaines v. Lunsford, 120 Ga. 370, 47 S.E. 967 (1904); Chesapeake Stone Co. v. Moreland, 126 Ky. 656, 104 S.W. 762 (1907); Tomten v. Thomas, 125 Mont. 159, 232 P.2d 723 (1951); McKenney v. Anselmo, 416 P.2d 509 (Idaho 1966); Cienega Cattle Co. v. Atkins, 59 Ariz. 287, 126 P.2d 481 (1942); Flora Logging Co. v. Boeing, 43 F.2d 145 (D.C. Ore. 1930); Hellberg v. Coffin Sheep Company, 404 P.2d 770 (Wash. 1965); Fanning v. Gilliliand, 37 Or. 369, 61 P. 636, 62 P.

209 (1900); State ex rel. Eastern Ry. & Lumber Co. v. Superior Court, 127 Wash. 30, 219 P. 857 (1923).

In Deseret Ranches of Florida, Inc. v. Bowman, 349 So.2d 155 (Fla. 1977), the Supreme Court of Florida reviewed Florida Statute §704.01(2) and §704.04 and determined that these statutes granting a statutory way of necessity were not unconstitutional on the ground that it permitted taking of property for a private rather than public purpose. Specifically, the Supreme Court of Florida found that the statute's purpose is predominently public and the benefit to the private land owner is incidental to the public purpose, ennunciating the public purposes as follows:

> ". . . sensible utilization of land continue to be one of our most important goals. We take notice that Florida grows in population at one of the fastest rates of any state in the nation. Useful land becomes more scarce in pro-

> portion to population increase, and the problem in this state becomes greater as tourism, commerce and the need for housing and agricultural goods grow. By its application to shut-off lands to be used for housing, agriculture, timber production and stock-raising, the statute is designed to fill these needs. There has been a clear public purpose in providing means of access to such lands so that they might be utilized in the enumerated ways." (p. 156)

Appellant SCUDDER argues however that the failure to permit an award of attorney's fees in the case of a "private" taking of his property for a statutory way of necessity denies him equal protection of the laws since he would be entitled to an award of attorney's fees pursuant to Florida Statute §73.091 in the event of a "public" taking.

As noted earlier, federal courts have refused to award attorney's fees in eminent domain proceedings in the absence of statutory authority. Dohaney v. Rogers, supra. The fact that the Floria legis-

lature by statute permits the private owner to recover reasonable attorney's fees in the event of a public taking can be justified in order to put the private owner on a parity with the condemning authority during the litigation. However, this same rational would not apply to an action by a private individual seeking a statutory way of necessity across his adjoining neighbor's land.

There are numerous examples where one litigant is permitted attorney's fees to the exclusion of another. For example, the principal is established that if a classification is otherwise reasonable, the mere fact that attorney's fees are allowable to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the equal protection clause. See Missouri, K. & T. R. Co. v. Cade, 233 U.S. 642, 34 S.Ct. 678, 58 L.Ed. 1135 (1914); Hunter v. Flowers, 43 So.2d 435 (Fla. 1949).

Statutes which permit an attorney's fee to be awarded to the insured in a suit brought by him against the insurance carrier seeking coverage under the insurance policy have been held to be not violative of the equal protection clause. Brandywine Shoppe, Inc. v. State Farm Fire & Casualty Co., 307 A.2d 806 (Del. 1973); Coker v. Pilot Life Insurance Co., 265 S.C. 260, 217 S.E.2d 784 (1975); Iowa National Mutual Insurance Co. v. City of Osawatomie, Kansas, 458 F.2d 1124 (10th Cir.1972).

Florida has affirmed the constitutionality of its statute providing for an attorney's fee to a successful insurance claimant under the doctrine that the attorney's fee may be imposed on the delinquent insurance company under the police power of the state as a penalty incurred in the conduct of a business affected with public interest. United States Fire Insurance Co. v. Dickerson, 82 Fla. 442, 90 So. 613 (1921).

This Court in Meeker v. Lehigh Valley R. Co., 236 U.S. 412, 35 S.Ct. 328, 59 L.Ed. 644 (1915) sustained a federal statute allowing a reasonable attorney's fee to a plaintiff successful in an action to recover damages from a common carrier resulting from the violation of interstate commerce provisions, adding that there was also a legislative purpose to encourage the payment of just demands without suit. And again, in Life & Casualty Ins. Co. v. McCray, 291 U.S. 566, 54 S.Ct. 482, 78 L.Ed. 987 (1934) this court, despite equal protection and due process arguments, upheld an Arkansas Statute allowing a life insurance policy holder a reasonable attorney's fee upon wrongful refusal of payment by the insuror, and noted that diversity of treatment in respect of the costs of litigation has its origin and warrant in diversity of social need. To the same effect is the Florida court in Fellow v. Equitable Life Assurance Society, 57 So.2d 581 (Fla. 1952).

The Supreme Court, in Dohaney v. Rogers, supra, in a Michigan case involving eminent domain, noted that a state may allow the recovery of an attorney's fee in special classes of proceedings while withholding them in others. The Court further held that in condemnation proceedings a state had the power to classify those whose property was taken and to allow the one class expenses not granted to another. The court recognized that a permitted classification necessarily involves the allowance of attorney's fees to some but a denial of their recovery to others. Against arguments of due process and equal protection, this court in Dohaney v. Rogers, supra, upheld the Michigan Statute which denied attorney's fees in the case of highway condemnation but permitted attorney's fees in the case of railroad condemnation proceedings.

In the instant case, Appellant SCUDDER claims a denial of equal protection of the

laws since he is not permitted attorney's fees in a "private" taking for a statutory way of necessity, but would be permitted attorney's fees by statute if this were a "public" taking. Obviously, the classification permitting attorney's fees for eminent domain proceedings by public authorities but precluding attorney's fees under private taking for statutory way of necessity is a reasonable classification. The attempt to put the private property owner on a parity with the public condemning authority is a sufficient basis to justify the classification.

THE TRIAL PROCEEDINGS DID NOT DEPRIVE APPELLANT OF HIS RIGHT TO TRIAL BY JURY

Florida Statute §704.04 specifically provides that a landowner may have a jury determine the amount of compensation to be awarded for the statutory way of necessity. In the instant case, a jury was impaneled to hear the legal issues relating to whether

or not a trespass had ocurred and if so, the amount of damages to be awarded Appellant for the trespass. Likewise, this jury was impaneled to consider the amount of compensation to be awarded for any taking of Appellant's property for a statutory way of necessity. (Appellant's Appendix P. 154)

Although both the Florida Constitution and the United States Constitution contain provisions relating to the "right to trial by jury", both Florida and Federal courts have held that there is no absolute constitutional right to a trial by jury in eminent domain proceedings. This is because the purpose of the constitutional provisions is to preserve and protect the common-law right to a jury trial and the right to a jury trial in condemnation proceedings did not exist at common law. See United States v. Reynolds, 397 U.S. 14, 90 S.Ct. 803, 25 L.Ed.2d 12 (1970); Carter v. State Road Department, 189 So.2d 793 (Fla. 1966). Accordingly, no

deprivation of Appellant's constitutional right to trial by jury exists by reason of the fact that the trial court elected to determine first whether a statutory way of necessity existed and, if so, to determine the nature, extent and location of such easement. In fact, Florida Statute §704.04 specifically provides that the court shall make this determination. This procedure likewise is consistent with eminent domain proceedings by a "public" authority since in all such instances, the Court first makes a determination as to whether or not there is to be a taking, and only in that event is the matter submitted to a jury for compensation. Again, this is the same procedure as provided in Florida Statute §704.04 permitting a jury to determine the compensation for the statutory way of necessity.

In the instant case, the parties stipulated that the issue of whether or not a trespass occurred and the issue of damages

both for the trespass and as compensatory damages for the statutory way of necessity were to be determined solely by the court and that the jury previously impaneled would be discharged. (Appellant's Appendix p. 159-161) Upon the specific questioning by the court, counsel for appellant agreed to presenting those issues to the court. (Appellant's Appendix p. 161) Since there is neither a constitutional guaranty nor requirement of a trial by jury in either federal or state constitutions, it follows that the parties may waive trial by jury and submit the issues of just compensation to the court. In re Shambow's Estate, 153 Fla. 762, 15 So.2d 837 (1943); Rodenbur v. Kaufmann, 320 F.2d 679 (D.C. Cir.1963). Since appellant waived his right to have a jury determine the amount of compensation for the statutory way of necessity and further waived his right to have a jury determine the issues of whether a trespass occurred,

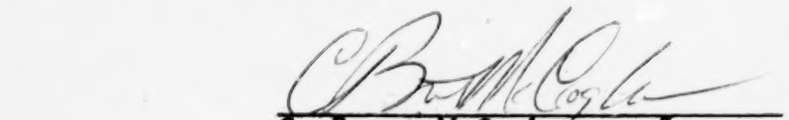
and if so, the damages to be awarded for such trespass, appellant cannot now complain of any violation of right to trial by jury.

CONCLUSION

Just compensation and requirements of due process of law do not require an award of attorney's fees to Appellant SCUDDER in state proceedings by a private land owner to establish a statutory way of necessity over Appellant's land. Further, the classification adopted by the Florida legislature in limiting recovery of attorney's fees to eminent domain proceedings brought by public and quasi public authorities but denying attorney's fees in private actions brought under §704.01(2) is within the permissable limits long recognized by this court. Finally, appellant waived any right to a jury trial on the issues of trespass and compensation. Accordingly, no substantial federal question is involved.

Appellee's Motion to Dismiss Appeal should be sustained.

Respectfully submitted,



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PROOF OF SERVICE

I, C. Brent McCaghren, of WINDERWEEDLE, HAINES, WARD & WOODMAN, P.A., attorneys for FLORIDA POWER CORPORATION, appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of October, 1978, I served three copies of the foregoing Motion to Dismiss on each of the several parties thereto, as follows:

On GILBERT D. SCUDDER, L. M. FOLSOM and PAULINE FOLSOM, by hand deliver to their respective attorneys of record, as follows:

To JACK B. NICHOLS, Esquire, attorney for appellant, GILBERT D. SCUDDER, 108 E. Hillcrest Street, Orlando, Florida 32802;

To JOHN H. RHODES, JR., Esquire, attorney for L. M. FOLSOM and PAULINE FOLSOM,

535 South Dillard Street, Winter Garden,

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MOTION OF APPELLEES,
L. M. FOLSOM and PAULINE FOLSOM, HIS WIFE,
TO DISMISS APPEAL

Appellees, L. M. FOLSOM and PAULINE FOLSOM, his wife, move that this appeal be dismissed on the ground that it does not present a substantial federal question and in supprt thereof they present the following agrument and authorities.

The appellant contends that Section 704.01(2) and 704.04, Florida Statutes, which established what is commonly called a statutory way of necessity whereby a private property owner, under certain defined circumstances, may have an access easement to his property over the land of another private property owner, are violative of the equal protection clause and the due process clause of the Fourteenth Amendment to the United States Constitution for four reasons which, summarized, are:

(1) The statutes violate the due process clause by allowing the taking of private property for a private purpose;

(2) The manner of the taking in this case violated the due process clause;

(3) The statutes violate the due process clause because, by failing to provide for attorney fees to be awarded or taxed as costs, they do not provide just compensation to the servient tenant; and

(4) The statutes violate the equal protection clause by creating a classification in

which attorney fees are not awarded while in eminent domain proceedings under Florida law attorney fees are awarded. The appellees will address these questions in the order enumerated.

I.

Florida Statutes 704.01(2) and 704.04 do not violate the Fourteenth Amendment of the United States Constitution by allowing the taking of private property for a private purpose. In Deseret Ranches of Florida, Inc. v. Bowman, 349 S. 2d 155 (Fla. 1977), the Supreme Court of Florida declared that these statutes serve a purpose that is predominently public. The Court found that the State has an interest in preserving access to lands within its boundaries so that their productivity might be utilized. There is no reason that the Fourteenth Amendment of the United States Constitution would mandate a different conclusion that that reached by the Supreme Court of Florida in construing Article X, Section 6(a) of the Florida Constitution (1968).

II.

The manner of the taking in this case does not raise any federal question. The appellant's argument under this question turns on an interpretation of a state statute that involves no constitutional questions. Section 704 01(2), Florida Statutes, provides that use of a statutory way of necessity shall not constitute a trespass. Appellant does not argue that this provision is violative of the United States Constitution in itself but argues, and at each previous state of this proceeding has argued, that the statute should be interpreted so as to not afford the dominent property owner protection against trespass until he has filed an action under Section 704.01(2), Florida Statutes, or until a judgment is rendered in his favor. This argument has been rejected at each stage of this proceeding. If this provision of the Florida statute is not unconstitutional in itself, the time at which it applies should not give rise to a federal question.

III.

The Supreme Court of Florida has ruled that Sections 704.01(2) and 704.04, Florida Statutes, do not provide for attorney fees to be included in the compensation awarded to a servient landowner when a statutory way of necessity is found to exist over his land. Estate of Hampton v. Fairchild Florida Construction Co., 341 So.2d 759 (Fla 1977). The Supreme Court of the United States has ruled that the United States Constitution does not require an award of attorney fees in condemnation proceedings in the absence of statutory authority therefor. Dohany v. Rogers, 281 US 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930). If the United States Constitution does not require that attorney fees be awarded as compensation or costs when land is taken through the power of eminent domain, it should not require that they be awarded in a case involving a statutory way of necessity.

IV.

The distinction made by the legislature of

the State of Florida whereby attorney fees are awarded in cases of eminent domain because of a statute to that effect and they are not awarded in action brought under Sections 704.01(2) and 704.04, Florida Statutes, is a logical and rational distinction which would not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. A number of reasons can be advanced to support the difference in classification.

The legislature may have felt that fairness required a landowner confronted with the economic resources of the State in an eminent domain proceeding to receive reasonable attorney fees as part of his award. It may have felt that increasing the ability of the individual land owner facing a condemnation action to hire a lawyer would be a worthwhile restraint against overuse or abuse of the power of eminent domain by governmental authority.

There is a considerable difference between the results of an eminent domain action and an action for a statutory way of necessity. Con-

demnation results in the land being taken permanently and absolutely from the landowner. Section 704.01(2), Florida Statutes, only creates an easement for limited purposes for the period of time that it is reasonably necessary to provide access to the dominant property. While this may well be a long time, it does not take the fee simple title.

Since a statutory way of necessity comes into existence by reason of objective, observable facts, a cautious prospective purchaser can ascertain its existence, or potential for existence, prior to purchase in most instances. Ways on which these facts can be ascertained are by careful physical inspection of the property and adjoining properties and roads, by use of the owner and parcel maps prepared by the County Property Appraiser, and by talking with adjoining property owners. Eminent domain, on the other hand, normally implements a governmental decision which the landowner would have little opportunity to anticipate.

V.

In addition to raising the foregoing questions, the appellant complains that his right to trial by jury was violated. A jury was empanelled in this case and then temporarily excused while the trial judge heard the evidence on the appellees' defenses and counterclaims. These consisted of a claim that a common law easement existed or, alternatively, an easement had been created by prescription or, alternatively, the type of easement contemplated by Section 704.01(2), Florida Statutes, existed. The first two causes of action are equitable in nature and the later is of statutory origin in derogation of the common law. It was logical to try these issues first because if either of the first two causes of action were successful, it would have been a complete bar to the appellant's trespass action. If the latter was successful, it would be a complete or partial bar to the trespass action depending upon the conclusions of the trial judge. Section 704.04, Florida Statutes, provides that the trial judge shall determine the type, extent

and location of the easement and only the question of compensation submitted to a jury, upon demand. As it turned out, the conclusions of the trial judge with respect to the statutory easement afforded the appellees, FOLSOM, complete protection against the charge of trespass. At the heart of the appellant's contention that his right to trial by jury was violated is a refusal to believe that this is the law although it has been declared to be so at each stage of this proceeding. He insists in this appeal that the appellees, FOLSOM, committed trespass although the Florida courts have all ruled that they did not because of the protection afforded by Section 704.01(2), Florida Statutes.

On the other hand, the ruling of the trial judge on the existence of a statutory way of necessity was such that it afforded no protection against trespass to the appellee, FLORIDA POWER CORPORATION. When the trial was ready to proceed on the issues of trespass against FLORIDA POWER CORPORATION and just compensation for the statutory way of necessity, the parties agreed to

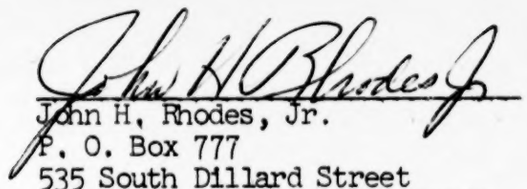
discharge the jury and submit these issues to determination by the trial judge. (Appellant's appendix p 159-161) For the appellant to imply that his decision to waive the jury trial was coerced by the schedule of the trial being tiring or demanding on the jury is unfair. This complaint was first raised at the appellate level. In fact, the jury had been released during most of the prior proceedings and there was no reason to think they were any more tired or inconvenienced than juries are normally.

The appellant suggests that a different order of trial would have produced a different result but offers no explanation of how or why this would occur. One can assume it would occur only by the trial judge improperly delegating his responsibilities to the jury or by the jury being hopelessly confused by the overlapping legal and equitable issues.

In short, the appellant was afforded a trial by jury on all the issues and causes of action that he had that were triable by jury

and he waived it.

Respectfully submitted,



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PROOF OF SERVICE

I, JOHN H. RHODES, JR., attorney for L. M. FOLSOM and PAULINE FOLSOM, his wife, appellees herein, and applicant for a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of October, 1978, I served three copies of the foregoing Motion to Dismiss on each of the several parties thereto, as follows:

On GILBERT D. SCUDDER and FLORIDA POWER CORPORATION, by hand delivery to their respective attorneys of record, as follows:

To JACK B. NICHOLS, Esquire, attorney for appellant, GILBERT D. SCUDDER, 108 East Hillcrest Street, Orlando, Florida, 32802;

To C. BRENT McCAGHREN, Esquire, attorney for FLORIDA POWER CORPORATION, 250 Park Avenue, South, Winter Park, Florida, 32789.

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